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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5704

JEAN CHRISTIAN and VICTOR L. GREEN,

Appellants,

v.

NEW YORK STATE DEPARTMENT OF LABOR, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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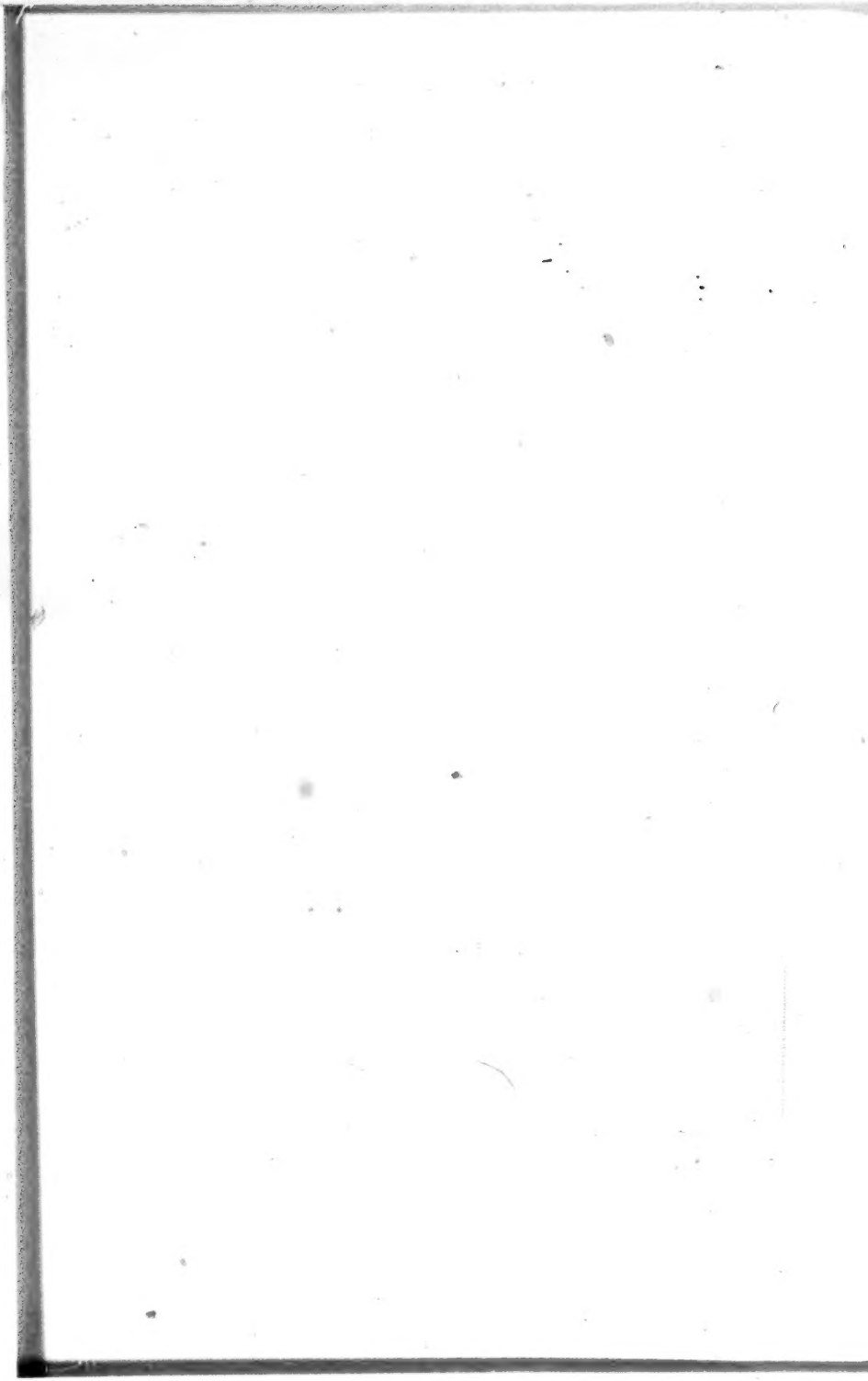

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The majority and dissenting opinions of the United States District Court for the Southern District of New York are reported at 347 F.Supp. 1158 (S.D.N.Y. 1972),

and appear in the Appendix at A. 62-77.[1] Because of the differences between the majority opinion of record and the majority opinion as subsequently reported, the appellants, when referring to either the majority or dissenting opinions, will refer only to the opinions of record as they appear in the Appendix at A. 62-77.

JURISDICTION

This Court's jurisdiction rests upon 28 U.S.C. §1253, which confers jurisdiction over this direct appeal from the final judgment of a three-judge United States district court convened pursuant to 28 U.S.C. §§2282 and 2284.

The judgment of the three-judge United States District Court for the Southern District of New York was entered on July 24, 1972. Appellants' Jurisdictional Statement was filed on November 14, 1972, and probable jurisdiction was noted by this Court on April 16, 1973.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution, each of which is set forth, in relevant part, in Appendix A to this Brief. (Brief App. 1a).

This case also involves statutory provisions enacted as part of the Social Security Act providing for state-administered unemployment compensation programs, 42 U.S.C. §503(a)(1) & (3), and providing for the Unemployment Compensation for Federal Employees program,

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[1] Throughout this Brief, references to the printed Appendix will be cited as "A. ___." The occasional references to the Appendix to this Brief will be cited as "Brief App. ___."

5 U.S.C. §§8501-8508. These respective statutory provisions are set forth, in relevant part, in Appendix A to this Brief. (Brief App. 1a-6a).

This case also involves the federal regulations promulgated by the United States Secretary of Labor under the Unemployment Compensation for Federal Employees program, 20 C.F.R. §§601.1 *et seq.*, and it involves the New York Unemployment Insurance Law provision for a fair hearing, N.Y. Labor Law §620. These provisions are set forth, in relevant part, in Appendix A to this Brief. (Brief App. 6a-8a).

The case further involves the federal jurisdictional statutes, 28 U.S.C. §1343(3) and 28 U.S.C. §1361, which are set forth, in relevant part, in Appendix A to this Brief. (Brief App. 8a-9a).

QUESTIONS PRESENTED

Appellants Christian and Green, former federal probationary employees who did not resign, are unemployed workers covered by unemployment compensation under the Unemployment Compensation for Federal Employees program, 5 U.S.C. §§8501-8508. Pursuant to the appellees' interpretation and enforcement of 42 U.S.C. §§503(a)(1) & (3) and 5 U.S.C. §§8501-8508, appellants were disqualified from receiving their statutory entitlement to unemployment compensation on the basis of their former employers' *ex parte* reasons for termination of employment without being provided any opportunity for a fair hearing to contest those *ex parte* reasons. The questions presented, therefore, are:

A. Does the denial of a fair hearing to unemployed workers, concerning their disqualification from receiving unemployment compensation, violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution?

B. Does the denial of a fair hearing to former federal probationary employees who did not resign, concerning the reasons for termination of employment, when such a fair hearing is provided to all other employees covered by unemployment compensation, including permanent and probationary private employees, permanent and probationary state employees, permanent and probationary federal employees who resign and all permanent federal employees, discriminate unfairly in violation of the Due Process Clause of the Fifth Amendment to the Constitution and the Equal Protection Clause of the Fourteenth Amendment to the Constitution?

C. Does the denial of a fair hearing to unemployed workers, concerning their disqualification from receiving unemployment compensation, violate the proper statutory construction of 42 U.S.C. §§503(a)(1) & (3) and 5 U.S.C. §§8501-8508?

D. Does a United States District Court have subject matter jurisdiction under 28 U.S.C. §1361 or 28 U.S.C. §1343(3) over federal officials to determine whether they have violated the Due Process Clause of the Fifth Amendment to the Constitution?

STATEMENT OF THE CASE

A. Statement of Facts

Appellants Jean Christian and Victor L. Green are unemployed workers covered by unemployment compensation under the Unemployment Compensation for Federal Employees program (hereafter sometimes "UCFE program"), 5 U.S.C. §§8501-8508. Both appellants sought to obtain their earned unemployment compensation, but their claims were denied solely on the basis of *ex parte* reasons for termination submitted to the New

York State Department of Labor by their former employers. (A. 42-47). Pursuant to the appellees' interpretation and enforcement of 5 U.S.C. §8506(a), a federal employer's *ex parte* reasons for termination of any federal probationary employee who did not resign, are final and unreviewable in the state fair hearing procedure required for unemployment compensation purposes by 42 U.S.C. §503(a) and 5 U.S.C. §§8501-8508. Since appellants Christian and Green had been federal probationary employees who did not resign, they were conclusively precluded, by the appellees' interpretation and enforcement of 5 U.S.C. §8506(a), from contesting or fairly establishing the reasons for termination for unemployment compensation purposes. (A. 42-47).

Appellant Jean Christian was an employee of the United States Post Office from April 4, 1970, to October 2, 1970, on which date her employment was terminated by the Post Office allegedly because of unsatisfactory conduct including an unsatisfactory attendance record. (A. 44). Appellant Victor L. Green was a skymarshall for the United States Department of Treasury, Bureau of Customs, from December 24, 1970, to December 18, 1971, on which date he was discharged allegedly for drinking an alcoholic beverage within twenty-four hours of flying. (A. 46, 52-53).

Both appellants were probationary employees during their periods of employment. (A. 44, 46). Pursuant to 5 C.F.R. §315.806, federal probationary employees have no right to appeal the reasons for termination and thus have no right to a termination hearing except in limited circumstances not applicable to this case. (A. 16, 30, 47, 54-55).

After the termination of their employment, each appellant filed a claim with the New York State Department of Labor for unemployment compensation under the Unemployment Compensation for Federal Employees program, 5 U.S.C. §§8501-8508. (A. 19, 31, 44). The New York State Department of Labor is the agency responsible for the administration of unemployment compensation in the State of New York, and, pursuant to an agreement[2] with the United States Department of Labor, the State Department of Labor also administers the payment of unemployment compensation to former federal employees under the UCFE program pursuant to state law. (A. 42). After the appellants had filed their claims for unemployment compensation, their former employers, the Post Office and the Department of the Treasury, submitted to the State Department of Labor *ex parte* reasons for the termination of appellants' employment. (A. 15, 29, 44). The State Department of Labor treats those reasons as final and conclusive. (A. 47-48). Consequently, appellants' claims for unemployment compensation were denied. (A. 44-46).

Pursuant to N.Y. Labor Law §620, persons who are dissatisfied with the result of an initial determination are entitled to a fair hearing before a referee.[3] (A. 48). Since

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[2]5 U.S.C. §8502 authorizes the United States Secretary of Labor to enter into an agreement with state unemployment agencies so as to provide for state administration of the UCFE program.

[3]This provision is mandated by §303(a) of the Social Security Act, 42 U.S.C. §503(a)(3), which requires all state unemployment compensation programs to make provision for:

> "Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for benefits are denied."

the UCFE program in New York is administered by the State Department of Labor pursuant to state law (A. 42), former federal employees who are dissatisfied with the result of an initial determination are also entitled to this hearing procedure before a state referee. However, since the State Department of Labor treats the reasons for separation submitted by the federal employers as final and conclusive (A. 47), the required fair hearing is unavailable to former federal employees such as appellants. (A. 44-46).[4]

The effect of treating the federal reasons as final and conclusive is illustrated by appellant Christian's case. Appellant Christian was discharged by the Post Office allegedly because of unsatisfactory conduct, including an unsatisfactory attendance record. (A. 16, 44). In its initial determination, the New York State Department of Labor found as "final, conclusive and binding," the reasons for termination submitted by the Post Office, and therefore denied her claim for unemployment compensation on the ground that her unsatifactory attendance record required disqualification for voluntary leaving without good cause. (A. 19, 44). Appellant Christian then requested a hearing pursuant to N.Y. Labor Law §620. (A. 15-16). She appeared at that hearing and testified as to the reasons for her separation from the Post Office. (A. 16, 21). After hearing all of the facts presented on behalf of the Post Office and on behalf of appellant Christian at that hearing, the hearing referee, acting contrary to the appellees' interpretation of 5 U.S.C. §8506(a), found that appellant Christian's

[4] Although this required fair hearing is not available to former federal probationary employees who did not resign, such as appellants, a fair hearing is available to all other former employees, see pp. 12-13, 30-33, *infra*.

absences from employment were justified, that her employer was advised beforehand of her absences, that she thus did not voluntarily leave without good cause, and that she therefore was eligible for unemployment compensation. (A. 21-22, 45). The State Department of Labor, through its Industrial Commissioner, appealed the referee's decision to the New York State Unemployment Insurance Appeal Board on the ground that the referee did not treat the *ex parte* federal reasons for separation as final and conclusive as required by the appellees' interpretation of 5 U.S.C. §8506(a). (A. 23-25, 45). The Appeal Board reversed the referee's decision, stated that it was bound by the *ex parte* federal reasons, and thus denied appellant Christian her right to unemployment compensation. (A. 27-28, 45).

B. Statutory and Administrative Framework

As part of the Social Security Act of 1935, as amended, 42 U.S.C. §§501-503, 1101 *et seq.*, and through the Federal Unemployment Tax Act, as amended, 26 U.S.C. §§3301-3309, Congress encouraged the adoption of state-administered unemployment compensation programs by providing for various tax incentives and for the federal payment of state administrative costs.[5] In order to ensure fair and proper administration of the state programs, Congress also provided that certain

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[5]26 U.S.C. §§3302 & 3303 allow credits to be taken against federal taxes for contributions made to a state's unemployment fund, and 42 U.S.C. §1101(c)(1)(A) provides for the payment of state administrative costs.

For a general history of the federal and state development of unemployment compensation, see E. Witte, *Development of Unemployment Compensation*, 55 Yale L.J. 21 (1945).

administrative requirements must be met by the states, 42 U.S.C. §§501-503. Among these provisions are the requirements for full payment of compensation when due and for a fair hearing:

> "The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State . . . includes provision for –
>
> "(1) Such methods of administration . . . as are . . . reasonably calculated to insure full payment of unemployment compensation when due; and
>
> * * * * *
>
> "(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 U.S.C. §503(a)(1) & (3)

The administrative procedures adopted by New York as part of its Unemployment Insurance Law, as amended, N.Y. Labor Law §§500 *et seq.*, generally conform to the aforementioned administrative procedures required by Congress. When a private or state employee has worked in covered employment[6] for a minimum period of time and has received a minimum amount of remuneration, that worker is generally "entitled" to compensation should he become unemployed. N.Y. Labor Law §590. If he becomes unemployed, the worker may file a claim for compensation with the State Department of Labor. N.Y. Labor Law §596. The State Department of Labor, through an impartial claims examiner, requests information from both the unemployed worker and the former employer, and, on the basis of the information received,

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[6]In New York, unemployment compensation covers not only private employment, N.Y. Labor Law §§512 and 560, but also state government employment, N.Y. Labor Law §§512, 560, 590.5.

the examiner makes an initial determination as to the eligibility of the worker. N.Y. Labor Law §597. If either the unemployed worker or the former employer is dissatisfied with this initial determination, a fair hearing may be requested before an impartial referee. N.Y. Labor Law §620. Since unemployed workers may be disqualified from receiving their earned compensation if they are voluntarily unemployed, N.Y. Labor Law §593,[7] the reasons for termination constitute one of the basic issues to be determined in this administrative procedure.[8] This basic administrative procedure is thus available to all private and state employees covered by unemployment compensation in New York.[9]

In 1954, Congress resolved that federal employees also should be covered by unemployment compensation. Reasoning that "[t]he Federal government should not be in the position of providing less favorable conditions

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[7]Pursuant to N.Y. Labor Law §593, a worker may be disqualified for "voluntary separation without good cause" or for "misconduct in connection with his employment."

[8]The importance of the reasons for termination in the unemployment compensation statutory scheme is reflected by the high percentage of appeals from initial determinations which concern disputed reasons for termination. During March, 1972, of the 4010 appeals taken to the hearing referee by the former employee or by the employer, 2506, or 62.4%, concerned issues of voluntary leaving without good cause or misconduct in connection with the worker's employment. New York State Department of Labor, *Operations*, Vol 34, No. 3, Table 17-A (March 1972). Similarly, in May, 1972, of the 3967 appeals taken to the hearing referee, 2471, or 62.2%, involved disputed issues of voluntary leaving or misconduct. New York State Department of Labor, *Operations*, Vol. 34, No. 5, Table 17-A (May 1972).

[9]This procedure generally parallels the administrative procedure described by this Court in *California Department of Human Resources Development v. Java*, 402 U.S. 121, 125-129 (1971).

of employment than are required of private employers,"[10] Congress amended the Social Security Act by adding the Unemployment Compensation for Federal Employees program. 5 U.S.C. §§8501-8508, formerly Title XV of the Social Security Act, §§1501-1510, 68 Stat. 1130 (1954).

Congress established two procedures for the administration of the UCFE program, one through the state unemployment compensation agencies and the other through the Secretary of Labor. 5 U.S.C. §§8502 and 8503. The first procedure, which applies where a state agrees with the Secretary of Labor to administer the program, 5 U.S.C. §8502(a), is applicable in New York. (A. 42). Under this procedure, federal services and wages are assigned to the state, 5 U.S.C. §8504, and the state is required to pay compensation to former federal employees as an "agent of the United States," 5 U.S.C. §8502(a)(1). Initial determinations as to eligibility for compensation are "subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law." 5 U.S.C. §8502(d). And compensation is to be paid to federal employees "on the same terms, and subject to the same conditions as . . . under the unemployment compensation law of the State." 5 U.S.C. §8502(b).[11]

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[10] S. Rep. No. 1794, 83rd Cong., 2nd Sess., 6 (1954); H.R. Rep. No. 2001, 83rd Cong., 2nd Sess., 7 (1954); see also 100 Cong. Rec. 10065 (1954) (remarks of Representative Reed); 100 Cong. Rec. 10079 (1954) (remarks of Representative Springer).

[11] Pursuant to the second procedure, which applies to federal employment in those states which do not have an agreement with the Secretary of Labor, the Secretary is to administer the UCFE program for the federal employees in those states. 5 U.S.C. §8503. Just as the states are required to provide a fair hearing under 42 U.S.C. §503(a)(3), the Secretary is required to provide a "fair

In order to implement the UCFE program through the states, Congress authorized a procedure whereby the federal employing agencies would make available to the state unemployment compensation agencies, various information concerning former federal employees' services and wages. 5 U.S.C. §8506. Specifically, 5 U.S.C. §8506(a) provides:

> "The information shall include the findings of the employing agency concerning –
>
> * * * * *
>
> "(4) the reasons for termination of Federal service.
>
> "The employing agency shall make the findings in the form and manner prescribed by regulations of the Secretary [of Labor]. . . . Findings made in accordance with the regulations are final and conclusive for the purpose of sections 8502(d) and 8503(c)."

Although it may appear from the statutory scheme that all covered federal employees, whatever their status, are to be paid compensation according to the same terms and conditions as are applicable under state law, this has not been the result. Pursuant to the Secretary of Labor's various interpretations of 5 U.S.C. §8506(a), the Secretary has provided different administrative procedures for three separate groups of federal employees.

One group of employees is composed of former federal probationary employees who did not resign, such as

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hearing" under 5 U.S.C. §8503(c). And, identical to the requirement which is imposed upon the states, the Secretary is required to pay compensation to former federal employees "on the same terms, and subject to the same conditions as . . . under the unemployment compensation law of the State." 5 U.S.C. §8503(a).

appellants Christian and Green. As to these employees, who may be separated without cause and who are not entitled to employment termination hearings,[12] the Secretary interprets the word "findings" in 5 U.S.C. §8506(a) to mean the *ex parte* reasons asserted by the former employer as the cause for separation from employment. Pursuant to this interpretation, the *ex parte* reasons are transmitted to the state where they are treated as final and unreviewable in the initial determination procedure as well as in the state fair hearing procedure.

A second group of employees, permanent and probationary employees who resign, is subject to a second interpretation of 5 U.S.C. §8506(a) by the Secretary. As to these employees, the Secretary interprets the word "findings" to mean determinations after a hearing. Pursuant to this interpretation, if there were no findings made as a result of a federal hearing, the information transmitted by the employer to the state is reviewable both on initial determination and in the state fair hearing; if, however, the worker had already been given a federal fair hearing, the impartially made findings are not reviewable by the state. 20 C.F.R. §609.18(a). The third group of employees, permanent federal employees, is subject to a similar interpretation of 5 U.S.C. §8506(a). Since all permanent federal employees are entitled to termination hearings,[13] the findings which are made as a result of those hearings are unreviewable by the state.[14]

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[12] See generally, 5 C.F.R. §§315.801-315.806.

[13] See generally, 5 C.F.R. §§752.201 *et seq.*, 771.101 *et seq.*, and 772.301 *et seq.*

[14] See generally United States Department of Labor Employment Security Manual, §6663 C.

C. Proceedings Below

On December 1, 1971, appellant Jean Christian commenced this action by filing a Complaint in the United States District Court for the Southern District of New York. (A. 1). On March 10, 1972, appellants Jean Christian and Victor L. Green filed an Amended Complaint.[15] (A. 1, 4-33). In the Amended Complaint, appellants sought injunctive and declaratory relief for themselves and for others similarly situated, to secure the right to a fair hearing concerning their eligibility for unemployment compensation. (A. 4, 12-14). Appellants alleged that the denial of fair hearings in connection with their right to unemployment compensation violated 5 U.S.C. §§8501-8508, 42 U.S.C. §503(a), 42 U.S.C. §1983, 42 U.S.C. §1985, and the Fifth and Fourteenth Amendments to the United States Constitution. (A. 4, 12-14).

Subsequent to the filing of cross motions for summary judgment by the appellants and the federal appellees, (A. 1-2, 49-50, 50-55), United States District Judge Marvin E. Frankel referred this case to the Chief Judge of the United States Court of Appeals for the Second Circuit for the convening of a statutory three-judge court. (A. 2, 59). Pursuant to an Order by the Chief Judge, dated May 24, 1972, Circuit Judge Paul R. Hays and District Judge Arnold Bauman, in addition to District

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[15] Named as defendants in the Amended Complaint were the New York State Department of Labor, Division of Employment; its Industrial Commissioner, Louis L. Levine; the United States Department of Labor; its Secretary, James D. Hodgson; the United States Postal Service Corporation; its Postmaster General, Elmer T. Klassen; the United States Civil Service Commission; its Chairman, Robert E. Hampton, and its commissioners, James E. Johnson and Jayne Spain; the United States Department of the Treasury; and its Secretary, John Connally. (A. 5-7).

Judge Marvin E. Frankel, were designated to hear the case. (A. 2, 59). After the June 8, 1972 hearing before the statutory court (A. 2), a majority of that court, one judge dissenting, denied the requested relief and dismissed the action. (A. 2, 62-77). In its opinion, dated July 24, 1972, the majority held: that the state and federal appellees' denial of a fair hearing to appellants concerning their eligibility for unemployment compensation under the UCFE program did not violate 5 U.S.C. §§8501-8508; that the state appellees' denial of a fair hearing to appellants concerning their eligibility for unemployment compensation under the UCFE program had a rational basis and was not violative of due process or equal protection; and that the court had no jurisdiction over the federal appellees under either 28 U.S.C. §1361 or 28 U.S.C. §1343 to determine appellants' constitutional claims against the federal appellees. (A. 62-70). In his dissenting opinion, Judge Marvin E. Frankel stated that he would not reach the constitutional questions, but instead would grant judgment for the appellants, on the ground that 42 U.S.C. §503(a) and 5 U.S.C. §§8501-8508, properly construed, require provision of a fair hearing, as held by *Smith v. District Unemployment Compensation Board*, 435 F.2d 443 (D.C. Cir. 1970). (A. 71-77).

SUMMARY OF ARGUMENT

Pursuant to the appellees' interpretation of the UCFE program, former federal employees who did not resign are conclusively denied their earned unemployment compensation solely on the basis of their former employers' *ex parte* reasons for termination without any opportunity for a fair hearing to contest those *ex parte* reasons. Appellants, denied their compensation without any opportunity for a fair hearing at any time, are denied

the fair hearing which is required by the Constitution, which is already provided to all other workers covered by unemployment compensation, and which is required by the unemployment compensation statutes.

A. Due Process

As required by 42 U.S.C. §503(a)(3), New York provides an unemployment compensation fair hearing to all workers who are denied their statutory entitlement to unemployment compensation. N.Y. Labor Law §620. Since the UCFE program in New York is administered pursuant to state law, the appellants are provided with the form of this procedure, but pursuant to the appellees' interpretation of the UCFE program, the appellants are denied this statutory fair hearing, although they have had no previous opportunity for any fair hearing through their federal employers. The denial of this fair hearing violates the most fundamental requirement of due process: the opportunity to be heard. Moreover, it altogether denies the appellants an opportunity to contest the employers' reasons for termination, the issue most frequently disputed in unemployment compensation. This adjudicatory procedure, which denies the appellants any opportunity for a fair hearing at any time on the issue most crucial to the statutory scheme, constitutes a fundamental denial of due process of law.

B. Equal Protection

Although this right to a fair hearing is denied to former federal probationary employees who did not resign, the same right to be heard on the issue most crucial to the unemployment compensation statutory scheme is provided to all other covered workers: permanent and

probationary private employees, permanent and probationary state employees, permanent and probationary federal employees who resign, and all permanent federal employees. This classification denying the right to be heard to a single group of former employees is not created by the unemployment compensation statutes. Rather, it is created by the appellees' interpretation of those statues. Such a classification, unsupported by any basis at all related to the purposes of unemployment compensation, denies the appellants equal protection of the laws.

C. Statutory Interpretation

The unemployment compensation statutes explicitly require an opportunity for a fair hearing for all workers whose claims for compensation are denied and further require unemployed federal workers to be placed on par with all other covered workers. Consistent with those requirements, the language of 5 U.S.C. §8506(a), which directs the making of "findings" concerning the "reasons for termination of employment," means findings made after a fair hearing and not mere *ex parte* reasons asserted by a former employer. Since only the findings made after a hearing may be "final and conclusive" on the states, this interpretation allows former federal probationary employees who did not resign to fairly establish the reasons for termination either in the statutory fair hearing already provided by the state or in a federal hearing. Such an interpretation gives effect to the statutory objectives of providing an effective wage substitute for unemployed workers without resort to relief, of maximizing the workers' opportunities to find new employment, and of providing unemployment compensation to all covered federal employees on the same

terms and conditions as apply to all other covered workers. This interpretation also provides for proper construction of a remedial statute and avoids declaring the statute unconstitutional.

D. Jurisdiction

Under the line of cases firmly established by this Court, the district court had subject matter jurisdiction under 28 U.S.C. §1361 and 28 U.S.C. §1343(3) to determine whether the federal appellees have abused their discretion in an unconstitutional manner and whether the federal and state appellees' joint interpretation and enforcement of the UCFE program have deprived the appellants of their constitutional rights.

ARGUMENT

A. THE DENIAL OF A FAIR HEARING TO UNEMPLOYED WORKERS, CONCERNING THEIR DISQUALIFICATION FROM RECEIVING UNEMPLOYMENT COMPENSATION, VIOLATES THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS.

The violation of due process presented in this case is basic: appellants, disqualified from receiving their earned unemployment compensation, are denied a fair hearing at any time in which they may contest and have fairly determined the fundamental factual issue on which their disqualifications were based.

In recent years this Court has been concerned with some of the more subtle nuances of due process present in the timing of hearings and the form of the requisite elements of such hearings. By the weighing of competing interests, this Court has resolved these finer questions in a

variety of contexts. See, *e.g.*, *Fuentes v. Shevin*, 407 U.S. 67 (1972) (notice and hearing required prior to prejudgment writ of replevin); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (notice and hearing required prior to termination of welfare benefits); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (notice and hearing required prior to prejudgment garnishment of wages). While these decisions requiring prior hearings *a fortiori* establish a right to at least one hearing, the appellants here are denied even this one hearing.

Rather than concerning the timing or form of a fair hearing, the issue here concerns the availability of a hearing which is required by statute and which is provided to all other persons for an impartial adjudication on a factual issue essential to the unemployment compensation statutory scheme.[16] As required by 42 U.S.C. §503(a)(3), New York provides a fair hearing to all persons who are dissatisfied with an initial determination of ineligibility for or disqualification from compensation. N.Y. Labor Law §620. Since a worker who has accrued an entitlement to compensation, N.Y. Labor Law §590 and 591, may be disqualified from receiving that compensation if the reason for his separation was due to leaving his employment without good cause or due to misconduct in connection with his employment, N.Y. Labor Law §593, the required fair hearing includes an impartial review of the reasons for separation. That the denial of this fair hearing violates due process is evident from this Court's decision in *Bell v. Burson*, 402 U.S. 535 (1971), which may be paraphrased as follows: "Since the

[16]It is this fair hearing on the "most frequently disputed" issue in unemployment compensation, *California Department of Human Resources v. Java*, 402 U.S. 121, 126 (1971), which is denied to the appellants and to other former federal probationary employees who did not resign.

statutory scheme makes . . . [the reasons for termination] an important factor in the State's determination to deprive an individual of his . . . [compensation], the State may not, consistently with due process, eliminate consideration of that factor in its . . . hearing." 402 U.S. at 541.[17]

The denial of due process here becomes even more apparent after an examination of the fundamental principles of due process. In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), this Court reviewed those principles pursuant to which due process protects property interests such as earned statutory entitlements. In order "to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." 408 U.S. at 570-771 (emphasis in original). Although the nature of a due process property interest may not be susceptible of precise delineation, the Court indicated that statutory entitlements such as unemployment compensation are near the core:

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[17] But for appellees' interpretation of 5 U.S.C. §8506(a), appellants would have been afforded an impartial initial determination of their eligibility for or disqualification from receiving compensation, N.Y. Labor Law §597; thereafter they would have been provided with a full evidentiary hearing before a referee, N.Y. Labor Law §620, with an opportunity for review of the referee's findings of fact and conclusions of law before the Unemployment Insurance Appeal Board, N.Y. Labor Law §621, and with an opportunity for review before the state courts on questions of law, N.Y. Labor Law §624.

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . .

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus the welfare recipients in *Goldberg v. Kelly, supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so." 408 U.S. at 577.

Entitlement to unemployment compensation, like welfare entitlement, is grounded in the statutory terms of eligibility.[18] But even more than public assistance, entitlement to unemployment compensation, which is accrued through employment and earnings, is generally understood as and was intended by Congress to be earned

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[18] 5 U.S.C. §8502(b) directs, "that compensation will be paid by the State to a Federal employee . . . subject to the same conditions as the compensation which would be payable to him under the unemployment compensation law of the State."

Under the Unemployment Insurance Law of New York, earned unemployment compensation must be paid to any worker who has earned a minimum remuneration during a minimum period of time, N.Y. Labor Law §590, who is totally unemployed and willing and able to work, N.Y. Labor Law §591, and who became unemployed involuntarily through no fault of his own, N.Y. Labor Law §593.

remuneration to which the worker is entitled as a matter of right.[19]

As the interest here is one protected by due process, the fundamental due process requisites of notice and hearing may not be denied. Beyond these fundamental requisites, however, the timing of the hearing required by due process and the form of the requisite elements appropriate to that due process hearing are ordinarily determined by weighing the respective interests of the opposing parties. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 (1972); see also *Fuentes v. Shevin*, 407 U.S. 67, 90, n. 21 (1972). It is pursuant to

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[19] When the Social Security Act was first brought to the floor of the House in 1935, the Chairman of the House Ways and Means Committee described the nature of unemployment compensation as follows:

> "The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of our population and its loss of self-respect. *The protection afforded by social insurance comes to the worker as a matter of right.*" 79 Cong. Rec. 5468 (1935) (remarks of Representative Doughton) (emphasis added).

Unemployment compensation was also described as a "contractual right" when it was introduced in the Senate. Report of the Committee on Economic Security, Hearings on S.1130 before Senate Finance Committee, 74th Cong., 1st Sess. 1321-1322 (1935).

In 1970, when Congress was addressing itself to certain amendments to unemployment compensation, it described unemployment compensation as an "earned monetary entitlement." Report of the Senate Finance Committee on the Employment Security Amendments of 1970, S. Rep. No. 91-752, 91st Cong., 2nd Sess. 24 (1971). See also Report of the House Ways and Means Committee on the 1970 Employment Security Amendments, H.R. Rep. No. 612, 91st Cong., 1st Sess. 19 (1970).

this weighing process that the Court has determined the finer issues of timing and form. Here, however, there is no issue as to the timing of the hearing, nor is there any issue here concerning the form of presenting evidence, of confronting and cross-examining witnesses, of obtaining counsel, of having a decision based upon the evidence, or even of having an impartial decision-maker since the appropriate procedures are already part of the state-administered statutory scheme. Instead, the issue here concerns the very right to that statutory fair hearing on an issue essential to an adjudication of the statutory entitlement.

The basic requisites of due process have been well established by this Court. The "fundamental requirement of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). And all persons "whose rights are to be affected are entitled to be heard." *Baldwin v. Hale*, 68 U.S. 223, 233 (1863). The hearing provided to these persons must be "meaningful." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). It must be a "fair hearing on the fundamental facts." *Southern Ry. Co. v. Virginia*, 290 U.S. 190, 199 (1933). Once due process attaches, these fundamental requisites are not to be denied.

Despite these fundamental requirements, a majority of the court below denied the appellants any opportunity for a fair hearing at any time. Relying upon an apparent misreading of *Goldberg v. Kelly*, 397 U.S. 254 (1970), the majority reasoned that "factual distinctions between *Goldberg* and the case at bar highlight the conclusion that the Government's interest in summary adjudication outweighs plaintiffs' need for a hearing here." (A. 69). Although the majority recognized that "[c]compensation is available as a matter of right," it reasoned that such compensation is "not of the same urgent nature to the

survival of the claimant as are welfare benefits," and that the appellants therefore must be altogether denied any opportunity to be heard on the adjudication of that right. (A. 69).

That *Goldberg* at the very least requires a fair hearing here is apparent from only a brief examination of that decision. In *Goldberg*, of course, it was admitted that due process required an opportunity to be heard at some point in the adjudicative procedure,[20] and in fact a full evidentiary review, similar to the hearing sought in the instant case, was required and already available as part of the administrative scheme. 397 U.S. at 257-258, 260, n. 7. The issue in *Goldberg*, unlike the more fundamental issue here, was whether due process further required a welfare recipient to be afforded some form of an "evidentiary hearing *before* the termination of benefits," 397 U.S. at 260 (emphasis in original). In deciding that issue, this Court weighed the opposing interests, not to determine whether *any* hearing was required, but to determine whether a *prior* hearing was required where there already was a subsequent fair hearing, and, deciding that affirmatively, to determine the form of that prior hearing in view of the subsequent evidentiary hearing. 397 U.S. at 260-271.

The issue here of course does not concern the timing or form of the fair hearing already provided by statute,

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[20] In *Goldberg*, this Court stated:

"Appellant does not contend that procedural due process is not applicable to the termination of welfare benefits. Such benefits are a matter of statutory entitlement for persons qualified to receive them.... Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert v. Verner*, 374 U.S. 398 (1963)." 397 U.S. at 261-262 (footnote omitted).

but rather it concerns only the availability of that statutory hearing. Borrowing the weighing test used in *Goldberg* to determine the timing and form of the hearing required by due process in that context, the majority below erroneously sought to employ this test to determine whether *any* hearing was required. By using an analysis similar to that squarely rejected by this Court in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-571 (1972), the majority incongruously denied the very meaning of due process to persons whose property interests are protected by due process. Once due process attaches, however, its "root requirement that an individual be given an opportunity for a hearing" cannot be so denied. *Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971).[21]

Although the fair hearing sought by appellants is already part of the statutory scheme here and was conceded to be required in *Goldberg*, and although the weighing process cannot emasculate the basic meaning of due process, the majority's weighing process, inappropriate as it was, entirely missed the mark even in its application. Reasoning that the need of unemployed workers' for their earned unemployment compensation was less critical than was the welfare recipients' need for welfare benefits in *Goldberg*, the majority held that the worker's interest in *any* hearing was outweighed by the

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[21] In *Fuentes v. Shevin*, 407 U.S. 67 (1972), the Court stated:

> "The relative weight of liberty or property interests is relevant, of course, to the form of notice and hearing required by due process . . . But *some* form of notice and hearing–formal or informal–is required before deprivation of a property interest that 'cannot be characterized as *de minimus*.' *Sniadach v. Family Finance Corp.*, 395 U.S. at 342 (Harlan, J., concurring)." 407 U.S. at 90, n. 21.

See also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

government interest in summary adjudication. (A. 69). First, of course, this Court has disposed of the notion that the welfare recipients' *need* for welfare benefits was critical to the timing or form of the hearing required in *Goldberg*. See *Fuentes v. Shevin*, 407 U.S. 67, 88-89 (1972).[22] Moreover, the purported government interest of summary adjudication which the majority below assumed to be identical to that in *Goldberg*, does not in fact exist here. In *Goldberg*, the government had argued that "[s]ummary adjudication protects the public fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible," and that this interest "justif[ied] the delay of any evidentary hearing until after discontinuance of the grants." 397 U.S. at 265. This proffered interest, rejected as constitutionally insufficient in *Goldberg*, 397 U.S. at 266, is not even present here since the government does not seek to justify a delay of the evidentiary hearing but to justify a complete denial of an evidentiary hearing on a fundamental issue.[23] Similarly, any proffered interest in speed

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[22] In *Fuentes* this Court stated that a view similar to that adopted by the majority below "reflects the premise that those cases [*Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and *Goldberg v. Kelly*, 397 U.S. 254 (1970)] marked a radicial departure from established principles of procedural due process. They did not. Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute "necessities" of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect. . . . While *Sniadach* and *Goldberg* emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine." 407 U.S. at 88-89 (footnotes omitted).

[23] In *Torres v. New York State Department of Labor*, 321 F.Supp. 432 (S.D.N.Y.), *vacated and remanded*, 402 U.S. 968 (1971), *previous decision adhered to*, 333 F.Supp. 341 (S.D.N.Y.

and efficiency, probably the most frequently rejected government interest,[24] can find no factual support here since the administrative machinery intended for the very purpose of fact-finding and review is already required by statute, and provided to all unemployed workers–except to workers such as appellants.

The majority's misapplication of due process principles and its resultant denial of any due process hearing to the appellants allows the appellants' former employers to engage in that type of adjudication which this Court has carefully sought to guard against: a "secret, one-sided determination of facts decisive of rights," *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951) (concurring opinion of Frankfurter J.). That such an adjudicative procedure was used to deny the

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1971), *aff'd without opinion*, 405 U.S. 949 (1972), a second case relied upon by the majority below, the governmental interest in summary adjudication was identical to that interest present in *Goldberg*. Since *Torres*, like *Goldberg*, concerned prior hearings, that government interest simply is not present here. Moreover, the fair hearing sought by the appellants here is already provided by the unemployment compensation statute which was at issue in *Torres*. N.Y. Labor Law §620.

[24] In *Stanley v. Illinois*, 405 U.S. 645 (1972), this Court rejected such a proffered interest stating:

> "But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." 405 U.S. at 656 (footnote omitted).

See also *Bell v. Burson*, 402 U.S. 535, 540-541 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 265-266 (1970); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

appellants their earned unemployment compensation is well illustrated by the facts surrounding the denial of compensation to appellant Christian. Initially disqualified from receiving compensation, solely on the basis of her former exployer's *ex parte* reasons for separation which were treated as "final, conclusive and binding" by the state, appellant Christian appealed that secret, one-sided determination to a state hearing referee. (A. 15-16, 19, 44). After an evidentiary hearing, the hearing referee apparently mistook his function by making an independent finding on the evidence—which finding contradicted the *ex parte* reasons submitted by the employer—and held Ms. Christian eligible for her compensation. (A. 21-22, 45). The referee's failure to accord final and conclusive weight to the reasons asserted by the employer was appealed by the state, however, and reversed by the Appeal Board which held that it was "bound" by the employer's *ex parte* reasons. (A. 23-24, 27-28, 45).

Since this unemployment compensation statutory scheme already provides for the form of a fair hearing, the substance of which is denied to appellants, this case is most readily comparable to that considered by the Court in *Bell v. Burson*, 402 U.S. 535 (1971). In *Bell* this Court determined the scope of the hearing necessary to suspend temporarily an uninsured motorist's driver's license. Although the statutory hearing allowed consideration of whether the driver had been involved in an automobile accident, had been insured and had posted bond, it specifically excluded from consideration the crucial question of possible liability. On reasoning equally applicable to the instant case, this Court held that due process was violated by the failure to afford a hearing on the issue of liability—the issue crucial to the statutory scheme:

"Since the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his licenses, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing.

"The hearing required by the Due Process Clause must be 'meaningful,' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), and 'appropriate to the nature of the case.' *Mullane v. Central Hanover Bank & Trust Co., supra*, at 313. It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet this standard." 402 U.S. at 541-542.

No less than the exclusion of the issue of liability in *Bell*, the preclusion of the termination issue in an unemployment compensation hearing deprives the worker of all opportunity to be heard on an element essential to the decision. It should need no greater explication than in *Bell* that a hearing which excludes consideration of an element essential to an adjudication disqualifying a worker from his unemployment compensation does not meet the standards of due process.

B. THE DENIAL OF A FAIR HEARING TO FORMER FEDERAL PROBATIONARY EMPLOYEES WHO DID NOT RESIGN, CONCERNING THE REASONS FOR TERMINATION OF EMPLOYMENT, WHEN SUCH HEARINGS ARE PROVIDED TO ALL OTHER EMPLOYEES COVERED BY UNEMPLOYMENT COMPENSATION, VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The statutory provisions for unemployment compensation in the Social Security Act of 1935, 42 U.S.C. §§501-503, and in the Social Security Act as amended by the Unemployment Compensation for Federal Employees program, 5 U.S.C. §§8501-8508, do not classify any covered workers so as to deny the right to a fair hearing. The appellees, however, have interpreted 42 U.S.C. §503(a)(3) and 5 U.S.C. §§8501-8508 in a manner which provides an opportunity for a fair hearing on the reasons for termination of employment to all workers covered by unemployment compensation except to former federal probationary employees who did not resign.[25] This classification, unsupported by any basis reasonably related to the purposes of unemployment compensation, denies the appellants equal protection of the laws.

The manner in which this classification has been created reflects its lack of rationality. First, pursuant to

[25] In many respects, the manner in which the classification has been created here is similar to the manner in which the classification had been created in *Frontiero v. Richardson*, ___ U.S. ___ , 41 U.S.L.W. 4609 (May 14, 1973). There, as here, the classification was not created by the federal statutory provisions at issue, but rather it was created by a federal agency's interpretation and enforcement of those statutory provisions.

the explicit requirements of 42 U.S.C. §503(a) as enforced by the Secretary of the United States Department of Labor, the State Department of Labor provides an opportunity for a fair hearing to all workers covered by unemployment compensation in New York. N.Y. Labor Law §620. Since coverage in New York extends not only to workers in private employment[26] but also to workers in state employment,[27] whether permanent or probationary,[28] all of these workers are provided with an

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[26] See N.Y. Labor Law §§512 & 560.

[27] Pursuant to N.Y. Labor Law §§512, 560 & 590.5, all state employees, except unclassified employees, are covered by and eligible for unemployment compensation. Since unclassified employees in New York are only those state employees who hold political or elective offices, N.Y. Civil Service Law §35, with all other state employees, whatever their status, being categorized as classified employees, N.Y. Civil Service Law §40, the overwhelming majority of state employees are covered by and eligible for unemployment compensation. For purposes of illustration, in the year 1965, 133,800 of the 143,500 state employees were covered by unemployment compensation, with only 9,700 political or elective employees not covered. New York State Department of Labor, *Unemployment Insurance Coverage of Workers in New York State*, 17-18 (August, 1967).

[28] Like the UCFE statute, the Unemployment Insurance Law of New York draws no distinction between permanent or probationary employees. This is not to say, however, that the Civil Service Law of New York does not draw distinctions between and among various classes of state workers. Indeed, state classified employees (those who are covered by unemployment compensation) are initially divided into four subclasses, see N.Y. Civil Service Law §§40-44, several of which are subdivided even further into probationary employees, temporary employees, and provisional employees, see N.Y. Civil Service Law §§63-65. All of these classified employees, however, are covered by unemployment compensation, and all are eligible for fair hearings for purposes of unemployment compensation at which they may fairly establish the reasons for their separation from employment, N.Y. Labor Law §620.

opportunity for a fair hearing on the reasons for termination of employment.

Second, pursuant to these same statutory requirements, and pursuant to 5 U.S.C. §8506(a) as interpreted by the Secretary of the United States Department of Labor, the State Department of Labor also provides an opportunity for a fair hearing for purposes of unemployment compensation on the reasons for termination to all federal employees, whether permanent or probationary, who resign, 20 C.F.R. §609.18(a).[29] Although this regulatory provision appears to be no more than an unsuccessful attempt to conform agency practice to federal court decisions,[30] its effect plainly is to allow an

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[29] 20 C.F.R. §609.18(a) provides:

> "Federal findings under §609.6 or §609.7 shall be final and conclusive except that Federal findings which contradict the reasons given by a Federal civilian employee for his resignation or which relate to the validity of such reasons shall not be final and conclusive unless such employee has been afforded an opportunity for a fair hearing on any issue involved in the alleged reasons for resignation. Such opportunity for hearing may be afforded by the Federal agency or the U.S. Civil Service Commission at any appropriate stage with respect to any personnel action, or upon request for reconsideration under §609.23."

[30] The regulation, promulgated in 36 Fed. Reg. 13330 (July 20, 1971), amended an earlier version which had stated only: "Federal findings under §609.6 or 609.7 shall be final and conclusive." 20 C.F.R. §609.18(a), 32 Fed. Reg. 20969 (Dec. 29, 1967). Since the regulation was amended to its present form after both the unanimous decision of the United States Court of Appeals for the District of Columbia, and the amended order, on remand, of the United States District Court for the District of Columbia in *Smith v. District Unemployment Compensation Board*, 435 F.2d 433 (D.C. Cir. 1970), *on remand*, Civil No. 2232-68 (D.D.C. Feb. 1, 1971) (see Brief App. 1c-2c), it is apparent that the amended regulation was promulgated in an attempt to conform with these

opportunity to be heard to those federal workers who resigned.

Third, pursuant to regulations of the Civil Service Commission, all permanent federal employees, as a result of their permanent status,[31] are accorded termination hearings by their employing agency[32] or by the Civil Service Commission on appeal.[33] Since these termination hearings most basically are hearings concerning the reasons for separation, permanent federal employees also are entitled to an opportunity to be heard.

Finally, however, pursuant to 42 U.S.C. §503(a) and 5 U.S.C. §8506(a), again as interpreted by the Secretary of the United States Department of Labor, the State Department of Labor denies an opportunity for a fair hearing on the reasons for termination to former probationary employees who did not resign. 20 C.F.R. §609.18(a). This classification is not only unrelated to the objectives of unemployment compensation, but it is altogether contrary to those objectives.

In *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971), this Court noted that the "purpose of the [Social Security] Act was to

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decisions. That the amended regulation hardly conforms with those decisions is apparent from the Court of Appeals' holding in *Smith* that: "*no finding* by a Federal employing agency should be conclusive on a Federal employee unless the employee had opportunity for a fair hearing." 435 F.2d at 438 (emphasis added).

[31] The first year of federal employment is a probationary period, 5 C.F.R. §§315.801(a) and 315.802(a). Thereafter the employee is considered a permanent employee.

[32] See generally, 5 C.F.R. §§752.201 *et seq.* and 5 C.F.R. §§771.101 *et seq.*

[33] See generally, 5 C.F.R. §§752.201 *et seq.* and 5 C.F.R. §§772.301 *et seq.*

give prompt if only partial replacement of wages to the unemployed, to enable workers 'to tide themselves over until they get back to their old work or find other employment without having to resort to relief.' " 402 U.S. at 131 (footnote omitted). More importantly, the Act itself explicitly requires the states to adopt administrative procedures which are "reasonably calculated to insure full payment of unemployment compensation when due," 42 U.S.C. §503(a)(1), and to provide "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied," 42 U.S.C. §503(a)(3).

When Congress amended the Social Security Act by adding the UCFE program, it reemphasized these objectives by requiring determinations of eligibility to be "subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law," 5 U.S.C. §8502(d), and by requiring compensation to be paid "on the same terms and subject to the same conditions as . . . under the unemployment compensation law of the State," 5 U.S.C. §§8502(b) and 8503(a). These explicit requirements reflect the specific congressional purpose in enacting the UCFE program: "The Federal government should not be in the position of providing less favorable conditions of employment than are required of private employers."[34] Despite the clarity of these statutory directives and objectives, the appellees have concluded that the federal government should *not* be in the position of providing these same

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[34] S. Rep. No. 1794, 83rd Cong., 2nd Sess., 6 (1954); H.R. Rep. No. 2001, 83rd Cong., 2nd Sess., 7 (1954); see also 100 Cong. Rec. 10065 (1954) (remarks of Representative Reed); 100 Cong. Rec. 10079 (1954) (remarks of Representative Springer).

terms and conditions of employment to former probationary employees who do not resign. Their creation of this classification is contrary to the basic principles of equal protection established by this Court.

The fundamental principle of equal protection was stated recently by The Chief Justice, writing for the Court in *Reed v. Reed*, 404 U.S. 71 (1971): "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co., v. Virginia*, 253 U.S. 412, 415 (1920)." 404 U.S. at 76. See also *Morey v. Doud*, 354 U.S. 457, 465 (1957).

Applying this fundamental standard in *Reed v. Reed, supra*, this Court noted that the proferred rational basis of reducing the work load on probate courts was a legitimate legislative objective, but the Court held that the creation of a statutory preference for members of one sex over the members of the other sex for appointment as an administrator was not rationally related to that objective. More recently, in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), the Court did not question the importance of protecting legitimate family relationships, the proferred rational basis there, but it found that the exclusion of illegitimate children from workmen's compensation recovery was not reasonably related to the objectives of workmen's compensation. Similarly, in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), this Court noted that although a general prohibition on contraceptives may be a legitimate legislative objective, denial of the contraceptives to unmarried persons but not to married persons was not reasonably related to the objective of the legislation. See also *Townsend v. Swank*, 404 U.S. 282, 291 (1971), where this Court noted that

assisting needy children to become employable and assuring fiscal integrity of a state's welfare program were worthy objectives, but where the Court doubted that a state's denial of AFDC eligibility to those children who attended college was at all reasonably related to those objectives. Thus, in assessing whether a classification constitutes a denial of equal protection, the express purposes of the legislation must be closely examined to determine whether the classifications created are rationally related to those objectives.[35]

In the three-judge court below the appellees did not attempt to relate their classification to the objectives of unemployment compensation. Rather, the only interest put forth at all was that asserted by the federal appellees of having an unfettered right to fire their probationary employees.[36] Although this interest may be a legitimate

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[35] It is well established that these principles restrict the arbitrary actions of federal officials under the Due Process Clause of the Fifth Amendment as much as they restrict those of state officials under the Equal Protection Clause of the Fourteenth Amendment. See, *e.g.*, *Frontiero v. Richardson*, ___ U.S. ___, 41 U.S.L.W. 4609 (May 14, 1973); *Shapiro v. Thompson*, 394 U.S. 618, 641-642 (1969); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Additionally, this Court has stated: "Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause." *Shapiro v. Thompson*, 394 U.S. 608, 641 (1969); see also *Townsend v. Swank*, 404 U.S. 282, 291 (1971).

[36] In the Court below, the state appellees, who provide fair hearings to permanent and probationary private employees, to permanent and probationary state employees, and to permanent and probationary federal employees who resign, and who are required by 42 U.S.C. §503(a)(3) to provide fair hearings to "all individuals whose claims for unemployment compensation are denied," offered no justification whatsoever for their denial of fair hearings to former Federal probationary employees who did not resign.

concern of the federal appellees in the employment and dismissal of their personnel, it is unrelated to the stated objectives of unemployment compensation. The majority of the court below, however, erroneously accepted this interest as a sufficient rational basis to sustain the classification. The majority stated that "Congress had good reason to differentiate between probationary and permanent employees in trying to promote the efficient disposition of Federal business." (A. 68). This "good reason" inferred by the majority was stated earlier in its opinion: "Certainly the Congress intended that Federal employers should have an unfettered right to terminate probationary employees up to the time such employees acquire permanent status. No termination hearing is prescribed or required nor should it be .... Such a hearing, as a practical matter, would limit the Government in the discharge of probationary employees to an extent never previously contemplated by the Congress." (A. 66-67).

The insufficiency of the federal appellees' alleged interest, as erroneously adopted in the majority's decision, is demonstrated by four considerations. First, of course, Congress made no distinction whatsoever between permanent and probationary federal employees for the purposes of the UCFE program. As stated by Judge Frankel in his dissenting opinion: "When Congress wrote the provisions before us for 'federal employees,' it drew no distinction between permanent and probationary workers. Neither the statute nor its history suggests that anyone had such a distinction, or its possible consequences, in mind."[37] (A. 73-74). In fact, the only

[37] Judge Frankel also made the compelling observation that Congress may even have been completely unaware of the civil service distinctions between probationary and permanent employees since the UCFE legislation had not been the responsibility

suggestion in either the statute or the legislative history which relates to this question compels a contrary conclusion. The definition section of the UCFE statute, rather than distinguishing between types of federal employees, plainly states: "'Federal employee' means an individual who has performed Federal service." 5 U.S.C. §8501(3).

Second, and again contrary to both the federal appellees' and the majority's position, neither Congress' objectives in providing unemployment compensation nor the appellants herein seek to limit the government in its discharge of probationary employees. As stated by Judge Frankel:

> "It should be stressed, therefore, that nobody claims a right of the probationary employee to test his *discharge* in a hearing. The only question is as to the availability of a hearing (given to everyone else, public or private) on eligibility for unemployment compensation. When the majority speaks of what is foreseen 'as a practical matter,' it evidently reflects the concern, exhibited in arguments to us for defendants, that the prospect of a hearing—even though not testing the discharge or capable of doing so—would make supervisors in the employing agencies timorous about discharging probationary people. This is a regrettable position. Insofar as it is accurate, it portrays a regrettable situation. We ought not to be so 'practical' that we fashion legal judgments upon the premise that federal officials commonly fire people upon grounds so tenuous that they would not dare order the firings if they thought someone, somewhere else, without author-

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of the House and Senate committees concerned with civil service affairs, but instead, "the responsible committee handling UCFE were House Ways and Means and Senate Finance." (A. 74).

ity to reverse the firings, might so much as air the asserted grounds." (A. 76) (emphasis in original).

Third, the purported rationale offered by the federal appellees and adopted by the majority below was neither attempted to be related to the objectives of unemployment compensation, nor is it in fact related to those objectives. Since one of those objectives was the provision of unemployment compensation to federal employees on the same conditions as apply to other covered employees, and since 42 U.S.C. §503(a)(3) plainly requires a fair hearing for all covered workers, denial of a fair hearing to one limited group of unemployed workers seriously conflicts with that explicit congressional objective, especially since the employment of probationary employees is conceded to be more precarious than that of permanent employees.[38] The objectives sought by Congress cannot be undone by the federal appellees, nor can they be subverted in their scramble to find a reasonable basis "having a fair and substantial relation to the object of the legislation." *Reed v. Reed*, 404 U.S. 71, 76 (1971).

Finally, the proferred rationale of an employment distinction between permanent employees and probationary employees does not even reflect and hence cannot support the actual classification applied by the

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[38]This consideration was aptly spelled out in the dissenting opinion of Judge Frankel:

"The strikingly inferior position to which plaintiffs have thus far been relegated for unemployment compensation purposes was never decreed—and seems never to have been considered as a prospect—by the Congress. The explicit purpose of putting public and private employees on a par applies at least as much to probationary workers (whose employment is more precarious) as to permanent workers for purposes of insurance against unemployment." (A. 75-76).

appellees. As discussed at pp. 30-33, *supra*, an opportunity to be heard on the reasons for separation is already provided not only to private and state probationary employees, but also to federal probationary employees who resign. Thus, the appellees' classification of former federal probationary employees who do not resign, to which the appellees and the majority deny the right to be heard, does not correspond to their more broadly based rationale. Not only are they without any basis reasonably related to the purposes of unemployment compensation, but they are without any basis at all.

The denial of the due process right to a hearing to one limited group while granting that right to a hearing to all other persons "is inescapably contrary to the Equal Protection Clause." *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (footnote omitted). In a recent case identical in all material respects to the instant case, *Smith v. District Unemployment Compensation Board*, 435 f.2d 433 (D.C. Cir. 1970), a unaminous panel of the Court of Appeals for the District of Columbia, after examining both the invidious classification and the objectives of the legislation, declared:

> "There is *no reasonable basis* for supposing that whereas Congress deliberately insisted on opportunity of hearing for employees generally, it deliberately established a no-hearing enclave for a relatively small group of Federal employees, and permitted them to be conclusively bound by a Federal finding made in the absence of a hearing." 435 F.2d at 438 (emphasis added).

As there is no reasonable basis for the establishment of a no-hearing enclave for such a limited group of federal employees, the appellees' classification must fall as a denial of equal protection of the laws.

C. THE DENIAL OF A FAIR HEARING TO UNEMPLOYED WORKERS, CONCERNING THEIR DISQUALIFICATION FROM RECEIVING UNEMPLOYMENT COMPENSATION, VIOLATES THE PROPER STATUTORY CONSTRUCTION OF 42 U.S.C. §503(a)(1) & (3) AND 5 U.S.C. §§8501-8508.

In reviewing acts of Congress which have been applied in a manner so as to raise substantial constitutional doubt, the Court has repeatedly held that "such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution." *The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903); see also, *Schneider v. Smith*, 390 U.S. 17, 26 (1968) citing a "stream of authority." The Court has also held that the interpretation of such acts ought not to frustrate the basic purposes of the statute, *California Department of Human Resources Development v. Java*, 402 U.S. 121, 134 (1971), and more importantly, that the statutory "terms . . . are to be construed to accomplish the purposes of the legislation," *United States v. Silk*, 331 U.S. 704, 712 (1947). In the instant case, the appellees urge the Court to construe the statute at issue in a manner which serves to frustrate its purposes and in a manner which, if accepted, would require holding that statute to be unconstitutional.

The statute at issue, 5 U.S.C. §8506(a), provides that a former federal employer shall make available to a state unemployment compensation agency or to the Secretary of Labor various information concerning the services and wages of former employees. Specifically at issue here is the language of 5 U.S.C. §8506(a) which provides:

> "The information shall include the findings of the employing agency concerning–
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> * * * * *

"(4) the reasons for termination of Federal service.

* * * * *

"Findings made in accordance with the regulations are final and conclusive for the purpose of sections 8502(d) and 8503(c)."

The appellants, Judge Frankel in his dissent from the majority of the three-judge court below (A. 71-77), and a unaminous panel of the Court of Appeals for the District of Columbia in *Smith v. District Unemployment Compensation Board*, 435 F.2d 433 (D.C. Cir. 1970), interpret this language, consistent with the purposes of the statute, to mean that *ex parte* reasons, which are mere assertions made without a hearing, are not *findings* and hence are not and cannot be final and conclusive in the fair and impartial hearing procedure already provided by the state. The appellees and a majority of the court below, however, interpret this same language to mean that the *ex parte* reasons asserted by the former federal employers as the cause for separation from employment are *findings*, and that those *ex parte* reasons, no matter how they were obtained, are final and unreviewable in the fair hearings required to be provided by the states. This twisted and unconstitutional interpretation is contrary to the purposes of the Social Security Act, as amended by the UCFE program, is contrary to the statutory language implementing those purposes, and is contrary to basic principles of statutory construction.

When Congress encouraged the adoption of unemployment compensation programs through its passage of the Social Security Act of 1935, as amended, 42 U.S.C. §§501-503, 1101 *et seq.*, and the Federal Unemployment Tax Act, as amended, 26 U.S.C. §§3301-3309, it sought to achieve two basic objectives: to provide sustenance and temporary security to unemployed work-

ers without their being relegated to seeking charity or public assistance; and to maximize the opportunity for unemployed workers to concentrate their time and efforts on finding new employment. Thoroughly familiar with the plight of workers who are "thrown out of work suddenly,"[39] and in recognition of their need for financial "security during the period following unemployment,"[40] Congress created a type of security specifically designed to "carry workers over most, if not all, periods of unemployment in normal times, without resort to any other form of assistance."[41] In designing unemployment compensation as a means to enable "workers who lose their jobs to tide themselves over, until they get back to their old work or find other employment without having to resort to relief,"[42] Congress was particularly mindful of the need to avoid the stigma and loss of self-respect which characteristically accompanies resort to public relief:

> The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of the population and its loss of self-respect. The protection afforded by social insurance comes to the worker as a matter of right. It is contingent upon the previous employment and contributions of the

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[39] Statement of Federal Relief Administrator and Member of the Committee on Economic Security, Hearings on H.R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 214 (1935).

[40] S. Rep. No. 628, 74th Cong., 1st Sess., 12 (1935).

[41] Report to the President, Committee on Economic Security, Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 1321-1322 (1935).

[42] H.R. Rep. No. 615, 74th Cong., 1st Sess., 7 (1935).

worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief.[43]

A second objective sought to be achieved through the availability of unemployment compensation was that of maximizing the opportunity to look for work. Recognizing that "unemployment compensation should be set up under conditions which tend towards the regularization of employment,"[44] Congress emphasized that those suddenly thrown out of work must "be permitted to look for a job. They should not be doing anything else but looking for a job."[45]

In order to ensure that these objectives would be carried out by the states, which generally were given a degree of flexibility in the creation of their state unemployment compensation programs,[46] Congress directed the states to adopt certain minimal administrative procedures. Among these directives was the general requirement that the states adopt only such procedures as are "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. §503(a)(1). In order to ensure a fair determination for the payment of such compensation, Congress further required the states to provide an "[o]pportunity for a fair hearing, before an impartial tribunal, for all individ-

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[43] 79 Cong. Rec. 5468 (1935) (remarks of Representative Doughton).

[44] S. Rep. No. 628, 74th Cong., 1st Sess., 14 (1935).

[45] Statement of Federal Relief Administrator and Member of the Committee on Economic Security, Hearings on H.R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 214 (1935).

[47] Message of the President, H.R. Doc. No. 81, 74th Cong., 1st Sess., 16 (1935).

uals whose claims for unemployment compensation are denied." 42 U.S.C. §503(a)(3).

When the Social Security Act of 1935 was enacted, it did not provide for coverage of federal employees.[47] Nineteen years later, however, in the wake of massive post-Korean War layoffs of temporarily employed federal workers,[48] Congress amended the Act by adding Unem-

[47] Three years after the passage of the Social Security Act of 1935, Congress extended its unemployment compensation coverage of private workers by covering unemployed railroad workers under the Railroad Unemployment Insurance Act of 1938, as amended, 45 U.S.C. §§351-367. Similar to the manner in which Congress had authorized the states to administer their own compensation programs, Congress authorized the Railroad Retirement Board to administer the railroad unemployment program. 45 U.S.C. §355(b). Again Congress sought to ensure the proper administration of the program by requiring the adoption of certain minimal administrative standards. Among these standards, once again, was the requirement that each "employee whose claim for benefits has been denied . . . shall be granted an opportunity for a fair hearing thereon before a referee or such other reviewing body." 45 U.S.C. §355(c).

[48] Representative Reed, one of the sponsors of H.R. 9709, made the following remarks concerning the need for unemployment compensation coverage of federal employees:

> "Federal civilian employees as a group are subject to the risk of unemployment on nearly the same scale as non-governmental workers in the same type of work. In recent years, particularly, several extensive reductions in Federal personnel have demonstrated the real need for extending unemployment benefits to Federal employees. From a wartime peak of well over 3-1/2 million employees in June 1945, Federal employment dropped by a million between 1945 and 1946 and dropped considerably more in the next few years, leveling off at about 2 million in June 1950. After a new increase due to the Korean conflict, Federal employment again fell off by nearly 247,000 between June 1952 and December 31, 1953." 100 Cong. Rec. 10065 (1954) (remarks of Representative Reed); see also, 100 Cong. Rec. 10079 (1954) (remarks of Representative Springer).

ployment Compensation for Federal Employees, 5 U.S.C. §§8501-8508, formerly Title XV of the Social Security Act, §§1501-1510, 68 Stat. 1130 (1954).[49] The broad purposes of the legislation were to end "the discrimination that has been practiced by the Federal Government against its Federal civilian employees"[50] and to "assure all of our citizens that they will be equally covered should they be so unfortunate as to become unemployed."[51] Pursuant to these objectives, Congress provided unemployment compensation coverage to nearly the entire federal civilian work force, then numbering approximately 2½ million workers.[52] Specifically included in this coverage were short-term federal employees such as probationary employees who had worked for periods as short as only two months.[53] In fact, the high

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[49] The 1954 Social Security amendments extending unemployment compensation coverage to federal employees were part of a broad legislative package the purposes of which were to extend and improve unemployment compensation generally. In addition to extending coverage to the nearly 2-1/2 million federal employees, the legislation: extended coverage to an additional 1-1/2 million private employees; allowed states to reduce unemployment tax rates for newly covered employers; and eliminated the quarterly installment means of paying the unemployment tax. See generally, H.R. Rep. No. 2001, 83rd Cong., 2nd Sess., 1-2, 9-13 (1954); S. Rep. No. 1794, 83rd Cong., 2nd Sess., 6-7, 8-12 (1954).

[50] 100 Cong. Rec. 10079 (1954) (remarks of Representative Springer).

[51] *Id.*

[52] 100 Cong. Rec. 10065 (1954) (remarks of Representative Reed); 100 Cong. Rec. 10084-10085 (remarks of Representatives Rees and Reed). See also, *Economic Report of the President*, 96-97 (1954).

[53] During the House debate on H.R. 9709, the following colloquy occurred:

separation rate among these short-term employees contributed to Congress' concern for the elementary fairness of covering federal workers:

> "Total annual separations of Federal employees are substantial. They have approximated around one-half million each year over a period of several years. The percentage which constitutes reductions in force and termination of temporary assignments has varied from approximately 17 to 50 percent of total separations. I do believe that the Federal Government should not be in the position of providing less favorable conditions of employment than are required of private employers."[54]

Manifesting this concern for elementary fairness and reemphasizing the objectives of its earlier compensation programs,[55] Congress again sought to ensure the proper

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Mr. REES of Kansas. "What are we going to do with Federal employees who work for short periods of time? Suppose someone is employed in my office or anywhere else in the Federal Government and works for 2 or 3 or 4 up to 6 months. Does he come under this law and does he get any benefits under it?"

Mr. REED of New York. "If he is out of employment." 100 Cong. Rec. 10084 (1954) (remarks of Representative Rees and Representative Reed).

[54] 100 Cong. Rec. 10079 (1954) (remarks of Representative Springer); see also 100 Cong. Rec. 10065 (1954) (remarks of Representative Reed); S. Rep. No. 1794, 83rd Cong., 2nd Sess., 6 (1954); H.R. Rep. No. 2001, 83rd Cong. 2nd Sess., 7 (1954).

[55] Although the objectives sought by Congress in the Social Security Act were implicit in its extension of unemployment compensation coverage to federal employees, one of those basic objectives—the avoidance of public assistance or charity—was specifically reemphasized on the floor of the house:

> "It is my conviction that in the year and a half the Republicans have been in power we have accomplished a

and fair administration of an unemployment compensation program. Thus, although Congress authorized two alternative procedures for the payment of compensation to federal employees, one through the state programs and the other through the Secretary of Labor, 5 U.S.C. §§8502 & 8503, respectively, the same minimal standards were required under both. As to the state procedure, which was already subject to the "when due" and "fair hearing" requirements of 42 U.S.C. §503(a)(1) & (3), Congress required determinations of eligibility to be "subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law." 5 U.S.C. §8502(d). As to the procedure administrated by the Secretary of Labor, which was not directly subject to the requirements of 42 U.S.C. §503(a)(1) & (3), Congress required a "fair hearing" for any federal employee whose claim for compensation was denied. 5 U.S.C. §8503(c). As to both procedures, and leaving no doubt as to the overall applicability of its requirements under 42 U.S.C. §503(a)(1) & (3), Congress required compensation to be paid to federal employees "on the same terms, and subject to the same conditions as . . . under the unemployment compensation law of the State." 5 U.S.C. §§8502(b) & 8503(a).

The specificity and yet the comprehensiveness of these congressional objectives and statutory requirements contrast vividly with the argument adopted by the majority of the court below—that somewhere in the

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great deal in abolishing thousands of Federal jobs, at a savings of billions to our tax-payers. But we have an obligation to wield our economy ax with prudence and foresight, and not to make displaced civil servants wards of the State or pawns of charitable institutions."
100 Cong. Rec. 10079 (remarks of Representative Stringfellow).

unemployment compensation scheme there is a distinction between probationary employees and permanent employees which allows federal employers to deny unemployment compensation to their former probationary employees merely by submitting *ex parte* reasons for termination of employment. (A. 66-67). Not only is this purported distinction unsupported by the statute or its legislative history,[56] but it is not even adhered to by the appellees themselves.[57]

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[56] Neither the majority of the three-judge court below nor the appellees offered any statutory language or legislative history which would even suggest an unemployment compensation distinction between probationary employees and permanent employees. In fact, there is no such language or legislative history. As Judge Frankel aptly pointed out in his dissenting opinion: "Neither the statute nor its history suggests that anyone had such a distinction, or its possible consequences, in mind." (A. 74). Indeed, the only legislative history relating to this matter plainly states that short-term employees are to be covered by unemployment compensation just as are all other employees. 100 Cong. Rec. 10084 (1954) (remarks of Representative Rees and Representative Reed).

In support of its result, the majority below disregarded this legislative history and instead relied upon the employment and dismissal distinction between probationary employees and permanent employees. (A. 66). Thus, in effect, the majority judicially grafted this employment and dismissal distinction onto the right to unemployment compensation despite the fact that the distinction is unrelated to unemployment compensation, other than its indication that short-term employees have a greater need for their earned unemployment compensation, and despite the fact that the UCFE statute itself defines a federal employee as "an individual who has performed Federal service," 5 U.S.C. §8501(3).

[57] Ironically, the distinction relied on by the majority is not even applied by the appellees. As noted at pp. 30-33, *supra*, not only are private and state probationary employees entitled to unemployment compensation on the same terms and conditions (which terms and conditions include a fair hearing) as other employees, but certain federal probationary employees too are

More basically, the majority's distinction is contrary to the congressional objectives of providing to all covered federal employees the same favorable conditions of employment as are provided to other covered employees, of providing an effective wage substitute for all covered workers, and of maximizing the workers' opportunities to seek new employment.[58]

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entitled to unemployment compensation on the same terms and conditions (which terms and conditions again include provision for a fair hearing) as other employees. Thus, the proferred distinction, in addition to being unsupported by the statute and its legislative history, is also unsupported by the appellees' own interpretation and application of the UCFE statute.

[58] Although the appellees' interpretation of 5 U.S.C. §8506(a) frustrates the explicit objectives and statutory requirements of the UCFE program in numerous and obvious ways, it frustrates these objectives and requirements in more subtle ways as well. An example is provided by the unemployment compensation requirements for wage combining whereby an employee who may not have worked long enough for or earned enough from any one employer during a one-year base period to qualify for unemployment compensation, may qualify by combining the periods of employment and wages earned under all of his employers during his preceding one-year base period. Since these wage combining requirements apply to all covered employment in New York, see New York State Department of Labor, Unemployment Insurance Bureau, Field Operations Manual §§12000-12090, and to all covered federal employment, *id.* §§21020-21032, an employee may earn compensation based upon combined private, state and federal employment. Although it may appear obvious that such an employee, who worked at his last job for only two months, should be equally eligible for compensation whether his last job was with the federal government or with another employer, the appellees' interpretation of 5 U.S.C. §8506(a) denies this equal treatment. If, for example, the worker's last job was with the state government, both he and his employer are entitled to have the reasons concerning separation fairly determined pursuant to the state fair hearing procedure. N.Y. Labor Law §620. If instead, that same

The importance of such explicit objectives and statutory requirements was recognized in *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971) where the Court construed the meaning of the word "due" in §303(a)(1) of the Social Security Act, as amended, 42 U.S.C. §503(a)(1). There, the Court stated:

> "We conclude that the word 'due' in §303(a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment." 402 U.S. at 133.

Not only did the Court state that any otner construction would fail to meet the objective of early substitute compensation during unemployment, but the Court also emphasized that the contrary construction urged by the state would frustrate one of the basic purposes of unemployment compensation:

> "It would frustrate one of the Act's basic purposes—providing a 'substitute' for wages—to permit an employer to ignore the initial interview or fail to assert and document a claimed defense, and then effectuate cessation of payments by asserting a

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worker's last job was with the federal government, his federal employer (pursuant to the federal appellees' interpretation of 5 U.S.C. §8506) may deny compensation (based partially on the employment and earnings in non-federal employment) merely by submitting to the state *ex parte* reasons for separation. Such an equal and unfair procedure hardly serves Congress' objective of providing the same favorable terms of employment to federal employees as are provided to all other covered employees.

defense to the claim by way of appeal." 402 U.S. at 134.

Since the result of the majority's decision below allows an employer to effectuate a denial of payments while ignoring both the initial interview and the state fair hearing, it frustrates one of the Act's basic purposes—providing a substitute for wages. And since the majority's decision more basically effectuates a denial of the fundamental opportunity to be heard, it compels a violation of the very meaning of the word "due" which requires "a hearing [at] which both parties have notice and are permitted to present their respective positions." 402 U.S. at 133.

Even without considering this proper construction of the word "due", the congressional objectives as well as the explicit statutory mandates requiring a fair hearing compel an interpretation of 5 U.S.C. §8506(a) which allows an opportunity for a fair hearing. After reviewing only these latter objectives and statutory requirements, a unanimous panel of the Court of Appeals for the District of Columbia held that "the statutory scheme established by Congress plainly contemplates that a Federal employee whose claim for compensation is denied is entitled to a fair hearing," and "that no finding by a Federal employing agency should be conclusive on a Federal employee unless the employee had opportunity for a fair hearing before an impartial tribunal." *Smith v. District Unemployment Compensation Board*, 435 F.2d 433, 436, 438 (D.C. Cir. 1970). A similar conclusion was reached by Judge Frankel in his dissenting opinion below. Summarizing his major disagreement with the majority's exclusion of "a small group of federal employees from the basic right to be heard," Judge Frankel stated:

> "(1) Congress evidenced its express purpose to make that right available to all employees, private or

public, (2) Congress likewise evinced the aim of avoiding second-class citizenship for federal employees with respect to the elemental need for a dignified form of wage substitute in times of unemployment, (3) the great bulk of federal employees are in fact upon a substantial par with private workers in having an opportunity to contest factual determinations which, if adverse, may preclude unemployment compensation, (4) the deprived group, probationary employees, appears not to have been specially noticed during the legislative process, and certainly not to have been singled out the special deprivation to which it is today held subject, and (5) the opposite result from the majority's, more consonant with the deep commitment of our jurisprudence to fair hearings as prerequisites to adverse determinations, is readily reconcilable with the text and essential objects of the pertinent statutory provisions." (A. 71-72).

Not only is the text of 5 U.S.C. §8506(a) readily reconcilable with the requirement of providing a fair hearing, especially "when construed in light of the purposes of the Act,"[59] but a fair examination of that statutory text alone compels a construction allowing for the right to a fair hearing. 5 U.S.C. §8506(a) generally provides that the various federal agencies shall make available to the states the "findings of the employing agency" concerning the "reasons for termination," and further provides that it is only the "findings" which are "final and conclusive." At the outset, it is readily apparent that the statute itself distinguishes between *findings*, on the one hand, and *reasons*, on the other, and

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[59] *California Department of Human Resources Development v. Java*, 402 U.S. 121, 133 (1971).

that the statute directs that only the *findings* are to be *final and conclusive*. This obvious distinction plainly suggests that the process of making findings is different from a mere assertion of *ex parte* reasons, and that reasons alone are not entitled to final and conclusive weight. Although the appellees and the majority below dispute this plain distinction and interpret the word *findings* to mean *ex parte* reasons, their interpretation is contradicted by the common usage and judicial interpretation of the word *findings*. Ironically, their interpretation is also contradicted by the appellees' own usage of the words *findings* and *reasons* in the termination hearings provided to permanent federal employees.

In its most elementary form the word *findings* is derived from the judicial process and refers to those impartial resolutions or determinations made subsequent to or as part of deliberations upon all evidence fairly presented. See *Black's Law Dictionary*, 758 (4th ed. 1957), citing cases.[60] In administrative proceedings of an adjudicatory nature, the word *findings* has retained its essential judicial characteristics. For example, in drafting the Administrative Procedure Act, Congress used the word *findings* to denote determinations made after a hearing. 5 U.S.C. §557(c)(1), (2) & (3)(a). This common legal usage of the word *findings* has similarly been adopted by the courts in their interpretation and application of the word. See, *e.g.*, *Crowell v. Benson* 285 U.S. 22, (1932); *I.C.C. v. Louisville & Nashville R. Co.*, 227

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[60] The word *finding* is first defined as the "result of the deliberations of a jury or a court," and second, as a "decision upon a question of fact reached as the result of a judicial examination or investigation by a court, jury, *referee*, coroner, etc." *Black's Law Dictionary*, 758 (4th ed. 1957) (emphasis added). Nowhere does the definition even approach an *ex parte* assertion of reasons by an interested party.

U.S. 88 (1913); *Sims v. Greene* 161 F.2d 87 (3rd Cir. 1947).

Perhaps the most significant use of the word *findings*, especially in view of the appellees' interpretation of 5 U.S.C. §8506(a), is found in the civil service regulations which provide the right to termination hearings to permanent federal employees.[61] Again, of course, the word *findings* is used to denote the impartial determinations made after a hearing before an impartial examiner, at which both the employer and employee have the opportunity to present evidence and to cross-examine witnesses. 5 C.F.R. §§771.208-771.213. In fact, the regulation concerning the report of the hearing examiner plainly distinguishes between findings made by the hearing examiner and mere reasons asserted by the parties to the hearings:

> "The examiner shall make a written report of his findings and recommendations. That report shall specify which of the reasons reviewed are found to be sustained and which are found to be not sustained, together with the conclusions drawn from those findings." 5 C.F.R. §771.213(a).

This distinction between findings and reasons is further clarified by another regulation which requires an employer, who is about to terminate a permanent employee, to provide that employee with "any and all reasons, specifically and in detail, for the proposed action." 5 C.F.R. §752.202(a)(1). Thus, not only does the language of 5 U.S.C. §8506(a) draw a distinction between *findings* and *reasons*, but the appellees' own regulations governing

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[61] See generally 5 C.F.R. §§752.201 *et seq.*, 5 C.F.R. §§771.101 *et seq.*, and 5 C.F.R. §§772.301 *et seq.*

civil service dismissals make plain that the two words are used to denote separate and distinct processes.[62]

This proper interpretation of 5 U.S.C. §8506(a), resulting from an isolated focus on the words *findings* and *reasons*, is buttressed by the only reasonable interpretation of the phrase in 5 U.S.C. §8506(a) which provides that "findings . . . are final and conclusive." In numerous instances this Court has construed various words and phrases providing for apparent final determinations so as to allow for review of those determinations which were not fairly made in the first instance.[63] For example, in

[62] To a limited extent, the appellees also recognize this distinction between *reasons* and *findings* in their application of 5 U.S.C. §8506(a) to permanent federal employees. For example, where a permanent employee applies for unemployment compensation and is also seeking to obtain reinstatement in his job through federal agency review and fair hearing procedures concerning the reasons for termination, the appellees have recognized that the mere *ex parte* assertions submitted to the state for unemployment compensation purposes should not be used, finally and conclusively, to disqualify the employee from compensation since the federal *findings* are yet to be made. Consequently, the appellees have adopted the position that "the State agency may not make a nonmonetary determination [against the permanent employee] until the personnel appeal relating to the UCFE claimant has been decided and the State agency has received a written notification from the former Federal employing agency or the U.S. Civil Service Commission on the disposition of the personnel action appeal." United States Department of Labor, Employment Security Manual, §6663 C. Unfortunately, however, the federal appellees have chosen to make this distinction between findings and reasons only for permanent employees. Moreover, their manner of making this distinction appears to conflict with the unemployment compensation "when due" requirement in 42 U.S.C. §503(a)(1). See *Pascua v. Hodgson*, No. 72-1720 (N.D. Cal., March 5, 1973).

[63] In addition to construing statutory provisions providing for apparent finality so as to allow for basic fairness, the Court also has frequently interpreted other statutory provisions so as to provide

Chin Yow v. United States, 208 U.S. 8 (1908), this Court held that a decision of the Department of Immigration and Naturalization could be "final" only if there had been a hearing held in good faith. Similarly, in *Crowell v. Benson*, 285 U.S. 22 (1932), where the Court was asked to determine whether a hearing officer's report could be final and conclusive consistent with the purposes of the Longshoremen's and Harbor Workers' Compensation Act, this Court stated that Congress could only provide for such finality, "assuming due notice, proper opportunity to be heard, and that findings are based on evidence." 285 U.S. at 47. See also, *Bridges v. Wixon*, 326 U.S. 135 (1945) where the Court held that the word "final" in the Alien Registration Act of 1940, 8 U.S.C. §155, did not bar review where a fair hearing had not been provided; *Estep v. United States*, 327 U.S. 114 (1946), where this Court held that final decisions of a selective service board (even after hearings) did not bar review of those decisions; *cf., Oestereich v. Selective Service System*

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for basic fairness or so as to avoid unduly harsh results. For example, in *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123 (1951) the Court construed designation "after appropriate investigation and determination" to require a hearing according to the essentials of due process. 341 U.S. at 138, n. 11. More recently, in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), this Court was faced with a section of the Immigration and Naturalization Act of 1952, 8 U.S.C. §101(a)(13), which defined "entry" of an alien to include entry after brief periods of absence. Noting that Congress had been concerned about liberalizing aliens' rights in the passage of the Act, this Court interpreted "entry" to cover only those entries which followed lengthy departures actually breaking residence in this country. Similarly, in *United States v. Rumely*, 345 U.S. 41 (1953) the Court construed the word "lobbying" to include only direct representational efforts directed at Congress rather than to unfairly cover all activities concerning the legislative process. See also, *Markham v. Cabell*, 326 U.S. 404 (1945).

Local Board No. 11, 393 U.S. 233 (1968).[64] In the same manner, the provision for finality in 5 U.S.C. §8506(a) cannot bar review in a state fair hearing where the alleged findings by the federal employers are actually no findings at all but rather only *ex parte* reasons asserted by the federal employers without providing for a fair hearing.

Accordingly, when the terms of 5 U.S.C. §8506(a) are examined apart from the legislative objectives and statutory mandates, the language alone compels a construction allowing for the right to a fair hearing. However, since "the terms . . . are to be construed to accomplish the purposes of the legislation," *United States v. Silk*, 331 U.S. 704, 713 (1947); *cf., California Department of Human Resources Development v. Java*, 402 U.S. 121, 133-134 (1971); and since the purposes of the legislation are to provide to all covered federal employees the same favorable conditions of employment as are given to other covered unemployed workers, to provide an effective wage substitute for all such unemployed workers, and to maximize the workers' opportunities to seek new employment, the only reasonable construction of 5 U.S.C. §8506(a) is one where *ex parte* reasons, which by definition are mere assertions made without a hearing, are not findings and hence are not and cannot be final and conclusive.

Two important principles of statutory construction further compel this proper interpretation of 5 U.S.C. §8506(a). One such principle requires remedial statutes

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[64] In *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233 (1968), this Court, interpreting "No judicial review" to allow limited judicial review, stated: "literalness in statutory language [may be] out of harmony either with constitutional requirements . . . or with an Act taken as an organic whole." 393 U.S. at 238 (citations omitted).

to be interpreted in favor of those for whom the statutes were intended to benefit. *Voris v. Eikel*, 346 U.S. 328, 333 (1953) (Longshoremen's and Harbor Workers' Compensation Act); *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930) (Federal Employer's Liability Act). Since the Social Security Act, as amended, is a remedial statute,[65] this Court has consistently construed the statute in favor of its beneficiaries, *California Department of Human Resources v. Java*, 402 U.S. 121 (1971); *United States v. Silk*, 331 U.S. 704 (1947); *Social Security Board v. Nierotko*, 327 U.S. 358 (1946); see also, *Standard Dredging Corp. v. Murphy*, 319 U.S. 306 (1943); *Buckstaff Bath House Co. v. McKinley*, 308 U.S. 358 (1939); *cf., Railroad Retirement Board v. Duquesne Warehouse Co.*, 326 U.S. 446 (1946) (Railroad Unemployment Insurance Act).

A second principle of statutory construction requires that statutes be construed to avoid constitutional doubt. *Schneider v. Smith*, 390 U.S. 17, 26 (1968) citing a "stream of authority." Frequently the Court has applied this principle to require provision for a fair hearing. In *Greene v. McElroy*, 360 U.S. 474 (1959), this Court was faced with the issue of whether a government employee was required to have a hearing concerning his being barred from future employment with the government. In requiring that such a hearing be given the Court stated:

> "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process." 360 U.S. at 507.

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[65] See pp. 42-47, *supra*. See also *Steward Machine Co. v. Davis*, 301 U.S. 548, 586-589 (1937); *cf., Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 515-518 (1937).

Similarly, in *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), the issue before this Court was whether a hearing was required concerning administrative designation of an organization, "after appropriate investigation and determination," as a communist organization. There, this Court determined that a hearing was required:

> "The Executive Order, defining his powers, directs only that designation shall be made 'after appropriate investigation and determination.' This surely does not preclude an administrative procedure, however informal, which would incorporate the essentials of due process." 341 U.S. at 172 (Frankfurter J. concurring).

See also *The Japanese Immigrant Case*, 189 U.S. 86 (1903), where this Court interpreted the Immigration and Naturalization Act, which was silent on the issue of hearings, to require due process hearings in all deportation cases.[66] Application of this principle here requires

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[66] Not only has this Court interpreted statutes and executive actions to require due process hearings, in order to sustain their constitutionality, but the Court has also required adjudicatory administrative actions to conform to the fair hearing requirements of the Administrative Procedure Act, 5 U.S.C. §§554-559, even where the fair hearing procedures of the Administrative Procedure Act were not applicable to the administrative actions. Specifically, although 5 U.S.C. §554(a) requires fair hearing procedures only where "opportunity for an agency hearing" is first required by statute, this Court has required fair hearing procedures where the statutes at issue were silent with regard to hearings. See, *e.g.*, *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950) (fair hearing procedures required in deportation proceedings although the Immigration and Naturalization Act made no reference to opportunity for a hearing); *Cates v. Haderlein*, 189 F.2d 369 (7th Cir.), *rev'd per curiam*, 342 U.S. 804 (1951) (fair hearing procedures required in the issuance of fraud orders by the Post Office although

that 5 U.S.C. §8506(a) be properly interpreted so as to require a fair hearing on the issue most crucial to a worker's eligibility for unemployment compensation. A contrary interpretation, pursuant to which 5 U.S.C. §8506(a) would deny the right to a fair hearing to a limited group of former federal employees while providing that right to all other covered workers, would require this Court to hold that statute unconstitutional under the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments.

D. THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION OVER THE FEDERAL APPELLEES TO DETERMINE WHETHER THEY HAVE VIOLATED THE CONSTITUTION.

One final matter remains to be considered. In the three-judge court below the majority declined to consider the constitutional issues as against the federal appellees on the grounds that it was without subject matter jurisdiction under either 28 U.S.C. §1361 or 28 U.S.C. §1343(3). (A. 67). The majority's decision, reached without discussion or citation of authority, is plainly contrary to the decisions of this Court.

In 1962, Congress amended the Judicial Code by adding 28 U.S.C. §1361 to provide the district courts with *mandamus* jurisdiction:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel

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no statute required opportunity for a hearing); *Riss & Co. v. United States*, 96 F.Supp. 452 (W.D. Mo. 1950), *rev'd per curiam*, 341 U.S. 907 (1951) (fair hearing procedures required for the denial of motor carrier operating certificates by the Interstate Commerce Commission although no statute required opportunity for a hearing).

> an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiffs." 28 U.S.C. §1361.

The purpose of enacting 28 U.S.C. §1361 was simply to extend to all district courts the same power to grant relief against federal officials as was then available through common law *mandamus* in the United States District Court for the District of Columbia.[67]

The relief available through common law *mandamus*, now incorporated into 28 U.S.C. §1361, includes corrective orders against federal officials who have abused their discretion or acted contrary to law. See *Harmon v. Brucker*, 355 U.S. 579, 582 (1958) (*per curiam*). That such an order in the nature of mandamus can issue against federal officials who have acted contrary to the Constitution is unquestioned. In *Garfield v. United States ex rel. Goldsby*, 211 U.S. 249 (1908), an action seeking *mandamus* relief against a federal official who had acted contrary to the requirements of due process, this Court made clear the appropriateness of *mandamus* relief:

> "[T]here is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action." 211 U.S. at 262.

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[67] "The purpose of this bill, as amended, is to make it possible to bring actions against Government officials and agencies in U.S. district courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia." S. Rep. No. 1992, 87th Cong., 2nd Sess., 2 (1962).

See also *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902).[68]

In addition to its subject matter jurisdiction over the federal appellees pursuant to 28 U.S.C. §1361, the district court also had jurisdiction purusant to 28 U.S.C. §1343(3). Section 1343(3) provides that the district courts shall have jurisdiction over any civil action:

> "To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." 28 U.S.C. §1343(3).

Contrary to the majority opinion below, 28 U.S.C. §1343(3) does not speak of jurisdiction over state officials (A. 67), but rather it speaks of jurisdiction over cases involving unconstitutional deprivations "under color of any State law, statute, ordinance, regulation, custom or usage." A long line of decisions by this Court has firmly established that where unconstitutional deprivations are asserted, §1343(3) jurisdiction is properly had over non-state officials so long as there has been some *joint participation* by state officials under color of state law. See, *e.g.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961); *Shelley v. Kramer*, 334 U.S. 1, 17-20 (1948); *cf.*, *Griffin v. Breckenridge*, 403

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[68] See also *Peoples v. United States Department of Agriculture*, 427 F.2d 561, 565 (D.C. Cir. 1970); *National Association of Government Employees v. White*, 418 F.2d 1126, 1129 (D.C. Cir. 1969); *Long v. Parker*, 390 F.2d 816, 818-819 (3rd Cir. 1968); *Walker v. Blackwell*, 360 F.2d 66, 67 (5th Cir. 1966); *Ashe v. McNamara*, 355 F.2d 277, 282 (1st Cir. 1965).

U.S. 88, 96-99 (1971); *United States v. Price*, 383 U.S. 787, 794 (1966). And just as such jurisdiction is properly found over non-state officials who are private persons, such jurisdiction is properly found over non-state officials who are federal officials, so long as there has been some *joint participation* by state officials under color of state law. *Kletschka v. Driver*, 411 F.2d 436, 448-449 (2nd Cir. 1969); *Smith v. Hampton Training School for Nurses*, 360 F.2d 577, 580 (4th Cir. 1966); *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959, 967 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

That the deprivation here is the result of joint participation between state and federal officials is apparent from only a brief review of the statutes involved. Since the New York Secretary of Labor has entered into an agreement with the United States Secretary of Labor (A. 42-43), not only are federal services and wages assigned to New York, 5 U.S.C. §8504, but New York is required to administer the UCFE program under "the same terms and subject to the same conditions" as are applicable under its law as an "agent of the United States," 5 U.S.C. §8502. The unconstitutional deprivations which have resulted from the state and federal appellees' joint administration, interpretation and enforcement of the UCFE program are sufficient for 28 U.S.C. §1343(3) to provide the district court with subject matter jurisdiction over the federal appellees.

CONCLUSION

The judgment of the three-judge court below should be reversed, and a judgment should be entered construing 42 U.S.C. §503(a)(1) & (3) and 5 U.S.C. §§8501-8508 to require an opportunity for a fair hearing for purposes of unemployment compensation for all former federal probationary employees who did not resign, or a judgment should be entered holding 5 U.S.C. §8506(a), as interpreted by the appellees, to be unconstitutional.

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APPENDIX A

Constitutional Provisions, Statutes and Regulations Involved

U.S. Const. Amend. V, provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

U.S. Const. Amend. XIV, §1, provides in relevent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §503 provides in relevant part:

> §503. State laws, provisions required; stopping payments on failure to comply with law
>
> (a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for–
>
> (1) Such methods of administration . . . as are . . . reasonably calculated to insure full payment of unemployment compensation when due; and
>
> * * * * *
>
> (3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied.

5 U.S.C. §§8501-8508 provide in relevant part:

> §8501. Definitions

For the purpose of this subchapter–

* * * * *

(3) "Federal employee" means an individual who has performed Federal Service.

8502. Compensation under State agreement

(a) The Secretary of Labor, on behalf of the United States, may enter into an agreement with a State, or with an agency administering the unemployment compensation law of a State, under which the State agency shall–

(1) pay, as agent of the United States, compensation under this subchapter to Federal employees; and

(2) otherwise cooperate with the Secretary and with other State agencies in paying compensation under this subchapter.

(b) The agreement shall provide that compensation will be paid by the State to a Federal employee in the same amount, on the same terms, and subject to the same conditions as the compensation which would be payable to him under the unemployment compensation law of the State if his Federal service and Federal wages assigned under section 8404 of this title to the State had been included as employment and wages under that State law.

* * * * *

(d) A determination by a State agency with respect to entitlement to compensation under an agreement is subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in that manner and to that extent.

§8503. Compensation absent State agreement

(a) In the case of a Federal employee whose Federal service and Federal wages are assigned under section 8504 of this title to a State which does not have an agreement with the Secretary of Labor, the Secretary, under regulations prescribed by him, shall, on the filing by the Federal employee of a claim for compensation under this subsection, pay compensation to him in the same amount, on the same terms, and subject to the same conditions as would be paid to him under the unemployment compensation law of the State if his Federal service and Federal wages had been included as employment and wages under that State law. However, if the Federal employee, without regard to his Federal service and Federal wages, has employment or wages sufficient to qualify for compensation during the benefit year under that State law, then payments of compensation under this subsection may be made only on the basis of his Federal service and Federal wages.

* * * * *

(c) A Federal employee whose claim for compensation under subsection (a) or (b) of this section is denied is entitled to a fair hearing under regulations prescribed by the Secretary. A final determination by the Secretary with respect to entitlement to compensation under this section is subject to review by the courts in the same manner and to the same extent as is provided by section 405(g) of title 42.

§8504. Assignment of Federal service and wages

Under regulations prescribed by the Secretary of Labor, the Federal service and Federal wages of a Federal Employee shall be assigned to the State in which he had his last official station in Federal service before the filing of his first claim for compensation for the benefit year. However–

(1) if, at the time of filing his first claim, he resides in another State in which he performed, after the termination of his Federal service, service covered under the unemployment compensation law of the other State, his Federal service and Federal wages shall be assigned to the other State;

(2) if his last official station in Federal service, before filing his first claim, was outside the United States, his Federal service and Federal wages shall be assigned to the State where he resides at the time he files his first claim; and

(3) if his first claim is filed while he is residing in the Virgin Islands, his Federal service and Federal wages shall be assigned to the Virgin Islands.

§8505. Payments to States

(a) Each State is entitled to be paid by the United States an amount equal to the additional cost to the State of payments of compensation in accordance with an agreement under this subchapter which would not have been made by the State but for the agreement.

(b) Each State shall be paid, either in advance or by way of reimbursement, as may be determined by the Secretary of Labor, the sum that the Secretary estimates the State is entitled to receive under this subchapter for each calendar month. The sum shall be reduced or increased by the amount which the Secretary finds that his estimate for an earlier calendar month was greater or less than the sum which should have been paid to the State. An estimate may be made on the basis of a statistical, sampling, or other method agreed on by the Secretary and the State agency.

(c) The Secretary, from time to time, shall certify to the Secretary of the Treasury the sum payable to each State under this section. The Secretary of the Treasury, before audit or settlement by the General

Accounting Office, shall pay the State in accordance with the certification from the funds for carrying out the purposes of this subchapter.

* * * * *

(h) For the purpose of payments made to a State under subchapter III of chapter 7 of title 42, administration by a State agency under an agreement is deemed a part of the administration of the State unemployment compensation law.

§8506. Dissemination of information

(a) Each agency of the United States and each wholly or partially owned instrumentality of the United States shall make available to State agencies which have agreements under this subchapter, or to the Secretary of Labor, as the case may be, such information concerning the Federal service and Federal wages of a Federal employee as the Secretary considers practicable and necessary for the determination of the entitlement of the Federal employee to compensation under this subchapter. The information shall include the findings of the employing agency concerning—

(1) whether or not the Federal employee has performed Federal service;

(2) the periods of Federal service;

(3) the amount of Federal wages; and

(4) the reasons for termination of Federal service.

The employing agency shall make the findings in the form and manner prescribed by regulations of the Secretary. The regulations shall include provision for correction by the employing agency of errors and omissions. Findings made in accordance with the regulations are final and conclusive for the purpose of

sections 8502(d) and 8503(a) of this title. This subsection does not apply with respect to Federal service and Federal wages covered by subchapter II of this chapter.

(b) The agency administering the unemployment compensation law of a State shall furnish the Secretary such information as he considers necessary or appropriate in carrying out this subchapter. The information is deemed the report required by the Secretary for the purpose of section 503(a)(6) of title 42.

§8508. Regulations

The Secretary of Labor may prescribe rules and regulations necessary to carry out this subchapter and subchapter II of this chapter. The Secretary, insofar as practicable, shall consult with representatives of the State unemployment compensation agencies before prescribing rules or regulations which may affect the performance by the State agencies of functions under agreements under this subchapter.

20 C.F.R. §§609.1 *et seq.* provide in relevant part:

§609.6 Federal findings on Form ES–931.

(a) Within 4 work days after receipt from a State agency or the Secretary of a Form ES–931 a Federal agency shall make its Federal findings, complete all copies of the form, and transmit its Federal findings to the State agency or the Secretary, as appropriate, on such form or as a part thereof. If documents necessary for completion of a Form ES–931 have been assigned to an agency records center or the Federal Records Center in St. Louis the Federal agency shall obtain the necessary information from the records center. Any records center shall give priority to such request.

(b) If a completed Form ES–931 cannot be returned within 4 work days of receipt the Federal agency immediately shall inform the State agency or the Secretary, as appropriate, and shall include an estimated date by which the completed form will be returned.

(c) Each Federal agency shall maintain a control of the Forms ES–931 received by it that will enable it to ascertain at any time the number of such forms that have not been returned to the requesting State agency or the Secretary and the date of the Federal agency's receipt of such unreturned forms.

§609.11 Appeal by Federal agency.

If a terminating Federal agency believes that a State agency's determination awarding or denying compensation is incorrect the Federal agency, unless otherwise prohibited by law, may appeal from such determination in the same manner and to the same extent as other employers may appeal under the applicable State unemployment compensation law except that a Federal agency may not appeal from the findings of another Federal agency.

§609.18 Finality of Federal findings.

(a) Federal findings under §609.6 or §609.7 shall be final and conclusive except that Federal Findings which contradict the reasons given by a Federal civilian employee for his resignation or which relate to the validity of such reasons shall not be final and conclusive unless such employee has been afforded an opportunity for a fair hearing on any issue involved in the alleged reasons for resignation. Such opportunity for hearing may be afforded by the Federal agency or the U.S. Civil Service Commission at any appropriate stage with respect to any personnel action, or upon request for reconsideration under §609.23.

(b) Additional information submitted by a Federal agency under §609.8 shall be considered part of the original Federal findings which, as so supplemented, shall be final and conclusive, as provided in paragraph (a) of this section.

(c) Federal findings which after reconsideration under §609.9 have been affirmed, modified, or reversed by the Federal agency shall be final and conclusive, as provided in paragraph (a) of this section.

§609.25 Appeal by Federal civilian employee.

(a) A determination or redetermination by a State agency as to a Federal civilian employee's entitlement to compensation is subject to review, except for Federal findings which are final and conclusive under §609.18, in the same manner and to the same extent as other determinations of entitlement under the State unemployment compensation law.

N.Y. Labor Law §620 provides in relevant part:

§620. Referees' hearings

1. Disputed claims for benefits (a) A claimant who is dissatisfied with an initial determination of his claim for benefits or any other party affected by such determination may, within thirty days after the mailing or personal delivery of notice of such determination, request a hearing.

28 U.S.C. §1343 provides in relevant part:

§1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

28 U.S.C. §1361 provides:

§1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANITA SMITH,)
)
Plaintiff,)
)
v.)
)
Civil Action
No. 2232-68
)
DISTRICT UNEMPLOYMENT)
COMPENSATION BOARD,)
)
Defendant.)

MEMORANDUM OPINION

This is an action to review a final decision of the District Unemployment Compensation Board under 46 D.C. Code §312. Plaintiff was employed as a personnel clerk at the Washington Navy Yard. She resigned for the following then-stated reasons:

> "I am resigning because of poor transportation, poor military supervisory-employee relations and uncongenial working conditions. My advancement in this position was intensely impeded by (Personal Prejudice) in this department."

The Navy made a finding at the time as follows:

> "Investigation failed to support allegations of employee."

When plaintiff's claim for unemployment compensation was presented to the Board's Claims Deputy, he disqualified her claim for five weeks on the ground that plaintiff's voluntary termination was, in the words of the

applicable regulation, "without good cause, in the light of all such facts, conditions, and circumstances as are relevant to the particular case." Plaintiff appealed to the Board's Appeals Examiner and a hearing was held on July 25, 1968. Plaintiff appeared and testified, elaborating her reasons and giving additional grounds for resignation in an effort to show good cause. No contrary evidence was taken. The Appeals Examiner concluded on the basis of the Navy's finding that good cause for leaving was not shown and that the action of the Claims Deputy was correct and affirmed. This decision then was appealed unsuccessfully to the District Unemployment Compensation Board. The parties now bring the matter before the Court on cross-motions for summary judgment.

Plaintiff contends she was denied due process of law under the Fifth Amendment in that she never received a real hearing on the merits of her case. Plaintiff as an employee of a federal agency is governed in making her claim for unemployment compensation by 5 U.S.C. §§8501 *et seq*. Since the Secretary of Labor pursuant to 5 U.S.C. §8502 has entered into an agreement with the District Unemployment Compensation Board, any claim by a federal government employee in the District is determined under the provisions of 46 D.C. Code §§301 *et seq*. However, 5 U.S.C. §8506 states, for the purposes of this case, that the findings of the federal agency as to the reasons for termination of employment shall be final and conclusive upon the District Board. Neither the statute nor the regulations issued thereunder describe any procedure by which the federal agency is to make its findings and no hearing is required.

In this case the Navy informed the District Board that plaintiff's allegations were not supported by its investigation. Since in the case of a federal employee the only task of the Board is to take the facts as found by the

federal agency and apply to them the District's standards for compensation, the Navy's finding here effectively precluded any result other than the one reached by the Claims Deputy. When he disqualified her claim for five weeks she appealed and pursuant to 46 D.C. Code §311(e) a hearing was held before the Appeals Examiner; but this was not a hearing such as one afforded a private employee or an employee of the District of Columbia Government. Plaintiff gave evidence but the Navy did not appear. Then, on the basis of the Navy's finding, the Appeals Examiner affirmed the denial of her claim since the facts as found by the federal agency were accepted as final and conclusive.*

Counsel could point to no specific provision requiring a hearing on the facts before the Navy. Although an ex parte determination by the federal agency may be sufficient to guide the decision of the Claims Deputy, surely when an appeal is taken to the Appeals Examiner the claimant cannot be foreclosed from testing these ex parte findings. To hold otherwise would be to cast doubts upon the constitutionality of the the statute or the implementing regulations due to the denial of due process of law. Federal claimants who appeal under 46 D.C. Code §311(e), if they have not been given a hearing before the federal agency in order to determine the reasons for termination, must be given a due process hearing in front of the District Board or its representatives as are other claimants. *Greene v. McElroy*, 360 U.S. 474 (1959).

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*It should be noted that Regulation III-A of the District Board states:

"Ordinarily a leaving will be presumed to be *involuntary* on the part of the claimant unless the facts clearly indicate otherwise. Where it appears that the leaving was voluntary, the burden of proof shall be on the claimant to establish good cause."

The defendant's motion for summary judgment is denied. The plaintiff's motion is granted in part and this case is remanded to the District Unemployment Compensation Board for a hearing consistent with the terms of this opinion.

Order to be presented.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

July 17, 1969

[Caption Omitted in Printing]

ORDER

The Court, after hearing counsel and considering briefs of the parties supporting their cross-motions for summary judgment, having filed a Memorandum Opinion dated July 17, 1969, it is this 29th day of July, 1969,

ORDERED that:

1. Defendant's motion for summary judgment is denied.

2. Plaintiff's motion for summary judgment is granted in part. This matter is remanded to the District Unemployment Compensation Board to hold a hearing in the above-captioned case for the purpose of determining the reasons for the plaintiff's terminating her employment with the Department of the Navy and further to determine, based on the evidence adduced at said hearing, whether the plaintiff's leaving her employment was for or without cause. The District Unemployment Compensation Board is directed to make an independent decision based solely on evidence produced at said hearing and the

District Unemployment Compensation Board shall not be bound in any respect by any decision of the Department of the Navy as to the reasons for plaintiff's terminating her employment. In other respects plaintiff's motion is denied.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

APPENDIX C

[Caption Omitted in Printing]

AMENDED ORDER

Upon consideration of the decision of the United States Court of Appeals dated August 28, 1970, affirming with modification this Court's order dated July 17, 1969, and upon consideration of plaintiff's proposed Amended Order, of defendant's opposition thereto, and of a memorandum filed by the United States Attorney indicating that the Department of the Navy has no procedures for an evidentiary hearing on the question whether plaintiff's resignation was voluntary but does not object to the Court striking the Navy's finding of voluntary separation from plaintiff's record, it is hereby

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that the finding of the Navy Department that its "investigation failed to support allegations of plaintiff" be striken from the document entitled "Reason for Separation or Non-Pay Status"; and it is further

ORDERED that the District Unemployment Compensation Board shall conduct such hearings and make such findings as are required by 46 D.C. Code §§310, 311, with respect to plaintiff's eligibility for benefits, and that such findings shall be made without regard to any finding by the Department of the Navy regarding the reasons for plaintiff's separation; and it is further

ORDERED that this action shall be stayed pending decision on plaintiff's claim by the District Unemployment Compensation Board.

This Amended Order shall supersede the Order issued by the Court in this case on July 17, 1969.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

January 28, 1971.